United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7283

United States Court of Appeals

For the Second Circuit.

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

Plaintiffs-Appellants,

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District of New York

Appellants' Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN
SAMUEL H. SLOAN & CO.

Plaintiffs-Appellants

-against- 75-7283

SECURITIES & EXCHANGE COMMISSION,
UNITED STATES OF AMERICA as the
SECURITIES & EXCHANGE COMMISSION
NATIONAL QUOTATION BUREAU, INC.
BUNKER RAMO CORP.
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC.
DISCLOSURE, INC.
NATIONAL CLEARING CORP.

Defendants-Appellees

PLAINTIFF'S APPEAL BRIEF

QUESTIONS PRESENTED

1. Did the Court below, Griesa, J., err in dismissing the complaint?
2. Did the below err in failing to convene a three judge court pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284?
3. Did the Court below err in failing to enjoin defendant Securities & Exchange Commission from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations and administrative proceedings, and from undertaking any acts or practices under color of the Securities Exchange Act of 1934 and other statutes and rules?
4. Did the Court below err in failing to conduct a hearing and in failing to grant Sloan's motion to preliminarily enjoin defendant National Quotation Bureau, Inc.?
5. Did the Court below err in failing to disqualify Dennis C. Hensley, Lloyd J. Derrickson, Robert Woldow, Thomas L. Taylor, III and George W. Brandt, Jr. and the law firm of Rogers & Wells from appearing as counsel for de-

fendants?

6. Did the Court below err in failing to grant a default judgment against the United States?

STATEMENT OF THE CASE

On June 27, 1974, the plaintiff, Samuel H. Sloan ("Sloan") commenced this action by filing a complaint which named the Securities & Exchange Commission ("S.E.C.") as the sole defendant. This complaint sought declaratory relief declaring S.E.C. Rule 15c2-11 and Sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act") to be unconstitutional. S.E.C. Rule 15c2-11 provides requirements for the listing of quotations in any "quotation medium." Sections 15(c)(5) and 19(a)(4) of the Exchange Act authorizedthe S.E.C. summarily to suspend trading in any security. Sloan summed up his complaint by stating that he should be "permitted to buy and sell any security and that he should be"permitted to list any security by name in the pink sheets." (A8).

In response to this complaint, the S.E.C. filed an answer dated August 23, 1974. At a pre-motion conference in September, 1974, the Court advised the plaintiff that the complaint as drafted was too vague and lacking in specifics and gave directions to the plaintiff as the requirements for an amended complaint. (A16). Subsequently, the plaintiff moved for leave to file an amended complaint and the Court granted this motion in the absence of opposition by the S.E.C. An amended complaint was, in fact, filed on October 22, 1974.

The amended complaint added a new plaintiff, Samuel H. Sloan & Co. ("Sloan & Co."), and six new defendants: United States of America as the Securities & Exchange Commission, National Quotation Bureau, Inc. ("NQB"), Bunker Ramo Corp., National Association of Securities Dealers, Inc. ("NASD"), Disclosure, Inc., and National Clearing Corp. ("NCC"). All parties were served and all but defendant United States of America as the Securities & Exchange Commission

filed answers. Following a pre-motion conference on January 10, 1975, the Court directed that all motions to dismiss and other motions to be filed by the defendants should be filed by January 31, 1975. The Court further directed that there would be no discovery until these motions were decided.

Following this pre-motion conference, the S.E.C. moved to dismiss under Rules 12b-1 and 12b-6 F.R. Civ. P. and for summary judgment. The NASD, the NCC and Bunker Ramo Corp. appearing together moved for dismissal and for judgment on the pleadings pursuant to Rule 12(b) and (c) F. R. Civ. P. and Rule 9 of the General Rules for the Souther District of New York. The NQB moved for judgment on the pleadings pursuant to Rule 12(c) F.R. Civ. P. The plaintiff cross moved (1) for a preliminary and permanent injunction enjoining the S.E.C. from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations, and from undertaking any acts or practices under the color of the Securities Exchange Act of 1934 and other statutes and rules, (2) for summary judgment or judgment on the pleadings as to the S.E.C. pursuant to Rule 56 F.R. Civ. P. (3) for convening of a three judge constitutional court pursuant to 28 U.S.C. 2282 and 28 U.S.C. 2284, (4) for an order requiring the appearance of the office of the U.S. Attorney or, in the alternative, for a default judgment against the United States of America pursuant to Rule 55 F.R. Civ. P. and (5) for an order disqualifying Dennis C. Hensley, Lloyd J. Derrickson, Robert Woldow, George W. Brandt, Jr., and Thomas L. Taylor, III from appearing as counsel for the various defendants. Furthermore, the plaintiff moved for a preliminary injunction enjoining the NQB from refusing to list his name in the "pink sheets" under any security. On February 14, 1975 the court granted all of the motions of the defendants and denied all of the motions of plaintiff and, in addition, dismissed the complaint as to defendant Disclosure, Inc. Plaintiff then moved for reargument. This motion was denied. Following the denial of the motion for reargument, a final judgment was entered against plaintiff. It is from this judgment that the plaintiff now appeals.

The amended complaint filed in this action contains five counts. Count I requests declaratory relief declaring the Exchange Act and various rules promulgated thereunder to be unconstitutional. Count II requests money damages and declaratory relief declaring certain suspensions of trading to have been arbitrary, capricious and unconstitutional and certain acts by S.E.C. investigators to have been illegal. Count III alleges violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 & 2) and Section 3 of the Clayton Act (15 U.S.C. 14) on the part of defendants NQB, Bunker Ramo Corp., NASD, S.E.C., NCC and Disclosure, Inc. Among other things, this count alleges that certain defendants have "entered into price fixing agreements with respect to NASDAQ in restraint of trade" (A62, §295). NASDAQ is described as "a nationwide electronics quotations system which links market makers with each other and with 'retail houses' which do business with public customers." (A30, §26). Count IV alleges violations of Section 10(b) of the Exchange Act and S.E.C. Rule 10b-5 on the part of certain defendants. This count also alleges common law fraud. Count V alleges miscellaneous acts of wrongdoing on the part of defendants and their employees and seeks money damages.

Rule 28(a) F.R. App. P. requires that in the statement of the case there be a "statement of facts relevant to the issues presented for review." In the case at the bar, however, it is difficult to know how to comply with this rule. Judge Griesa's oral decision, read into the record, does not seem to be based on any particular statement of facts. Instead, the decision speaks in absolutes. Judge Griesa seems to express the view that "the claim against the NASD and Bunker Ramo regarding the NASDAQ is legally invalid," (A309), because the NASD is immune from anti-trust liability. As to the S.E.C., Judge Griesa states that the general attack [against the Constitutionality of the Exchange Act] has been for so long and so conclusively established against the plaintiff's position that further discussion is unnecessary." (A305). As to the NQB, Judge Griesa states: "The claim relating to the National Quotation Bureau is patently frivolous." (A310). As to the NCC, Judge Griesa states that

Sloan's "remedy is with the S.E.C. and in the Court of Appeals, not in an action in this court." (A311). As to Count IV, Judge Griesa says: "This merits no discussion." (A311). As to Disclosure, Inc., Judge Griesa dismisses the complaint sua sponte with the statement: "That's frivolous. I'm simply going to dismiss it." (A313). As to the motions for disqualification if counsel, Judge Griesa says: "There is no discussion necessary. Those are absolutely frivolous." (A313). At the end of this oral decision, Judge Griesa adds: "I wish to make it clear that I am dismissing this complaint without leave to replead. There has been one opportunity to replead and no further opportunity will be granted." (A313-4).

While speaking in absolute terms, Judge Griesa cites only three cases. Those cases are Wright v S.E.C. 112 F. 2d 89, 94-95 (2d Cir. 1940); American Sumatra Tobacco Corp. v S.E.C. 110 F. 2d 117 (D.C. Cir. 1940) and Ricci v Chicago Merchantile Exchange 409 U.S. 289, 302-303 note 13 (1973). Thus, Judge Griesa, in making his decision, did not pass on the factual sufficiency of the complaint. Rather, he adopted the argument advanced in the brief of the S.E.C. That argument was (1) that the S.E.C. is immune from suit and (2) that the S.E.C. has exclusive jurisdiction over the subject matter of the complaint and that Sloan should be required to pursue his remedies with the S.E.C. and then, if necessary, with the Court of Appeals. Thus, Judge Griesa was basing his decision not on any particular statement of facts but on a determination that regardless of what the facts were in this case, the plaintiff could not prevail. Therefore, there are no facts involved in this appeal unless the appellees wish to raise questions of fact. However, this brief will make no attempt to anticipate what issues of fact might become involved in this appeal.

SUMMARY OF ARGUMENT

The district court erred in dismissing the complaint. The NASD, the

NCC and Bunker Ramo Corp. do not possess immunity from anti-trust liability. The rates charged to brokers for entering the NASDAQ system are not involved with the "public interest" and are not necessary to make the Exchange Act work. Furthermore, the S.E.C. has no power to review the rates charged by Bunker Ramo Corp. to brokers and dealers. The S.E.C. has never conducted hearings or expressed an interest in regulating the rates fixed by the NASD and Bunker Ramo Corp. for entry into the NASDAQ system. Therefore, assuming arguendo that the S.E.C. does have the power to review these rates, it has not actively and aggressively exercised this power and therefore the rates are not being monitered in the manner which Congress intended. Furthermore, the policy of the NASD of excluding Sloan and all other non-NASD members from entry into the NASDAQ system cannot be justified as necessary to make the Exchange Act work. This restraint of trade is a clear violation of anti-trust laws. The argument that Sloan should pursue his remedies with the S.E.C. is specious because there are no remedies available and, in any event, the S.E.C. has no power to grant the relief Sloan is seeking. Furthermore, questions involving anti-trust law are for the courts and not for the S.E.C. to decide. This court is fully competent to decide questions involving federal securities law and federal anti-trust law and consequently there is no need to take advantage of any special expertise the S.E.C. might have.

The district court erred in not conducting a hearing on Sloan's motion for an injunction as to the NQB. The NQB's defense to this motion was based entirely on affidavits which conflicted with Sloan's affidavits and therefore a hearing was necessary. Furthermore, the actions of the NQB in denying Sloan access to the pink sheets and thereby depriving him of the opportunity to bid in competition with other brokers was a violation per se of anti-trust law. The claim that the NQB was obliged to keep Sloan out of the pink sheets in order to protect the public from violations of S.E.C. rules was without basis because the S.E.C. was actively monitoring the situation and was capable of

protecting its own interests in the event that a rule violation were to occur. Sloan was not required to post a bond because no harm could possibly result to the NQB for fulfilling its contractual obligation to Sloan to grant him access to the pink sheets.

The motions for disqualifications should have been granted. Four of the attorneys in question were not members of the bar of the Southern District of New York nor had they obtained special leave of court to appear. The fifth had formerly been an employee of the S.E.C. and had prosecuted a prior injunction action against Sloan. He was therefore disqualified from accepting private employment to oppose Sloan in a lawsuit.

The district court erred in failing to convene a three judge court. Such a court should have been convened both to consider Sloan's application for a preliminary injunction against the S.E.C. and to decide the outcome of this suit on the merits. The question of the constitutionality of the Exchange Act has never been reached by the Supreme Court. Furthermore, it is well established that Congress cannot delegate it's legislative powers. The existance of an independent regulatory body such as the S.E.C. is repugnant to the constitution. Furthermore, the specific rules challenged in the complaint are unconstitutional under the First, Fourth, Fifth and Tenth Amendments as well as under the "required records" standards established by Supreme Court decisions.

A default judgment should have been entered as to the United States. Sloan took all necessary steps to see to it that the United States was properly served and he should not suffer prejudice because of an apparent disagreement between the S.E.C. and the U.S. Attorney as to who should appear in this action.

Regardless of what this court decides in this appeal this action must be remanded because of intervening circumstances. On June 5, 1975, an Act of Congress was passed which put into effect sweeping changes in the Exchange Act.

Since the court must base its decision on the law which is in effect at the time it makes its decision, it is necessary that the action be remanded for a fresh determination of the issues involved in this appeal.

ARGUMENT

POINT I

INTERVENING CIRCUMSTANCES REQUIRE THAT THE JUDGMENT BE VACATED AND THAT THIS ACTION BE REMANDED TO THE COURT BELOW.

On June 5, 1975, Congress passed the Securities Acts Amendments of 1975. This act, which amends the Exchange Act, brings about sweeping changes which require that this action be remanded. For example, as to the claim of immunity from anti-trust liability presented in the district court, the NASD and the S.E.C. both relied entirely on Section 15A(n) of the Exchange Act (15 U.S.C. 78o(A)(n)). That section stated:

> "If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail."

Section 15A(n) is, however, deleted from the new act. In the Report of the Senate Banking Committee, S. Rep. No. 93-865, 93rd Cong. p. 11 (1974) the reason for this change was explained as follows:

> "Section 15 of S. 2519 would eliminate present section 15A(n) of the Exchange Act. This section, while not expressly referring to the antitrust law, includes such laws in providing that, in the event of conflict of any other law with any provision of the Exchange Act relating to registered securities associations, the latter shall prevail. In light of the anomalous absence of a similar provision with respect to national securities exchanges and the prevailing case law interpreting the section e.g., Harwell v Growth Programs 451 F. 2d 240 (5th Cir. 1971), rehearing denied 459 F. 2d 461 (5th Cir. 1972), cert. denied 409 U.S. 876 (1972), the Committee decided to delete it as superfluous and unnecessary.
>
> "The deletion of section 15A(n) is not intended to change existing law with respect to the relationship between antitrust and securities laws - nor is any other provision of S. 2519 intended to change that relationship. The Committee believes that the standards enunciated by the Supreme Court in Silver v New York Stock Exchange 373 U.S. 341 (1963) and Ricci v Chicago Mercantile Exchange 409 U.S. 289 rehearing denied 410 U.S. 960 (1973) provide a sound basis for reconciling the

two statutory schemes. Indeed, in drafting S. 2519, the Committee assumed that the provisions of the bill would be interpreted in accordance with the basic principle enuciated in Silver that no repeal of the antitrust laws with respect to the conduct of self regulatory organizations would be implied unless such repeal were necessary to make the Exchange Act work, and even then only to the minimum extent necessary."

Although the bill substantially expands the scope of the S.E.C.'s oversight and regulatory powers and specifically directs that agency to take competitive factors into account in exercising those powers, the Committee does not intend thereby to confer general antitrust immunity on the self-regulatory organizations with respect to conduct subject to the S.E.C.'s oversight. In the Committee's view, it is essential that the antitrust courts retain their jurisdiction to make the ultimate accommodation between antitrust principles and the powers and actions of the self-regulatory organizations. The Committee is certain that in doing so, the courts will carefully consider the S.E.C.'s views on the relationship between the action or rule at issue and the effectuation of the purposes of the Exchange Act. Such consideration would not, however, in any way affect the courts' ultimate jurisdiction in appropriate cases to make a de novo determination as to whether self-regulatory conduct, irrespective of whether it has been approved or required by the S.E.C., constitutes an unreasonable restraint on competition which cannot be justified as necessary to protect the achievement of the aims of the Exchange Act."

It has long been established that when a change in the law occurs, a court must apply the law that is in effect at the time it renders its decision. Bradley v Richmond School Board 416 U.S. 696, 711 (1974). For this reason since a change in the law has occurred, the appellate court should remand for reconsideration in light of the intervening changes. Fusari v Steinberg 419 U.S. 379 (1975). Another part of this brief will deal with certain of the antitrust implications involved in the operation of the NASDAQ system. It should be noted, however, that the NASD, which operates the NASDAQ system, is no longer a trade association in any normally accepted meaning of the term. The Securities Acts Amendments of 1975 have converted the NASD into an arm of the government. Of course the NASD has always exercised some governmental type functions but always before the NASD has been, in principle at least, an independent trade association. In addition, Congress has created a new entity, the Municipal Securities Rulemaking Board, which, according to Congress, is a new "self-regulatory organization."

This precise arrangement was held to be unconstitutional in Schechter

Poultry Corp. v United States 295 U.S. 495, 537 (1936). Although Schechter Poultry like many other decisions of the same era has been under a cloud for nearly forty years it was recently revived by the Supreme Court in National Cable Television v United States 415 U.S. 336, 342 (1974) which in turn was followed by Federal Power Commission v New England Power Company 415 U.S. 345 (1974). These Supreme Court decisions, it will be seen, quickly lead to the result that the Exchange Act, as amended, is unconstitutional.

It is possible that the NASD will argue that it still possesses immunity from anti-trust liability in spite of the fact that Section 15A(n) of the Exchange Act has been repealed. In this respect, it may find some solace in page 112 of Senate Report No. 94-75, 94th Cong., 1st Sess. (1975). A few words about this Senate Report are in order.

This report is 254 pages long. Pages 1 - 88 are devoted to explaining the Securities Acts Amendments of 1975. Pages 88- 143 continue this explanation with a section by section analysis. Finally, pages 145-253 give the text of the new legislation. Thus, it can be seen that most of the Senate Report is devoted to explaining what the new legislation means. Since the text of the new legislation is, to put it charitably, difficult to comprehend, the Senate Report has attempted to provide a service by explaining in standard English the otherwise unintelligable Securities Acts Amendments of 1975.

Page 112 of the Senate Report states, in part:

> "The elimination of subsection [15A]n is not intended to change the status of any NASD rule or action under the anti-trust laws. Specifically, section 15(A) (which would become Section 15A(e) under the bill) would continue to prevail over any other law if there is a conflict between the two."

However, the new Section 15A(e) does not seem to provide for any actual or implied exemption from the anti-trust laws. Moreover, this section, which in substance was included in the old Exchange Act, has always been interpreted

to mean that NASD members could exclude non-NASD members from participating in underwriting syndicates involving the sale to the public of new issues and mutual funds. A similar provision was involved in United States v National Association of Securities Dealers, Inc. ___ U.S. ___, 45 L. Ed. 2d 486 (1975), a case which is distinguishable from the action at the bar. The policy of the NASD has always been and continues to be that its members may deal with non-member over-the-counter market makers in the same manner as they would deal with NASD member market makers. Otherwise, the NASD member might be forced to buy from an NASD market maker at a price higher than that at which he would be required to pay the non-NASD market maker. This would be contrary to the NASD rule which requires that an NASD member obtain the best price for his customer. If the rule were different, Sloan would not have been able to survive in business because, starting in 1970, he dealt, as a non-NASD market maker, almost exclusively with NASD members.

One of the issues involved in this lawsuit concerns the fact that as a matter of policy the NASD will not permit a non-NASD member to subscribe to Level III of NASDAQ. Non-NASD brokers are permitted to subscribe to Level I of NASDAQ, which provides the broker with a "representative bid-asked quotation," and to Level II NASDAQ, which permits the broker to see the markets of the respective market makers. However, it is Level III NASDAQ which gives the broker the right to make his own markets in competition with other brokers. Although the NASD contends that the policy of excluding non-NASD members from Level III of NASDAQ is exempt from the operation of the anti-trust laws, it appears that this policy is unwritten. Thus, the NASD policy in this regard would not be known to anyone except Sloan and the handful of other non-NASD market makers who are excluded from NASDAQ by this policy.[1] It is hard to

1. As far as plaintiff is aware, only three other non-NASD market-making brokers are excluded from Level III NASDAQ because of this policy. One is B.S. Lichtenstein, a 79 year old blind man, who actively trades a large number of securities in the pink sheets. In Standard & Poor's

(footnote cont.)

understand how the NASD can argue that Congress intended to exempt this policy from the operation of the anti-trust laws when this policy is unwritten and Congress is undoubtedly unaware of its existance. Furthermore, it is clear that the intent of Congress is entirely the opposite. The thrust of the Securities Acts Amendments of 1975 is to bring about the elimination of anti-competitive factors in the securities markets. Far from expressing confidence in the S.E.C., Senate Report No. 94-75 more than once expresses grave dissatisfaction with the past performance of the S.E.C. in this area. For example, page 67 of Senate Report 94-75 says:

> "In short, the Committee believes that the S.E.C.'s concern for assuring that the securities markets serve public purposes is appropriate but that the means it has chosen to deal with the question of the combination of money management and brokerage and the use of exchange memberships for private purposes is inappropriate to the task.
>
> The S.E.C.'s rule is convolved and essentially anti-competitive. The bill would, therefore, abrogate Rule 19b-2 and exchange rules adopted by exchanges pursuant to this rule and replace them by new section 11(a) of the Exchange Act. While this new provision would give the Commission authority to regulate or prohibit transactions by members which are not absolutely banned, the Commission would not have the authority to prohibit any transaction on any national securities exchange by a member for its own account, the account of an associated person, or an account with respect to which the member or an associated person exercises investment discretion simply because of the type of business done or the type, amount, or mix of transactions, effected on such exchange or otherwise by such member, associated person, or account.
>
> Rule 19b-2 represents a regretful chapter in the Commission's generally distinguished history. The bill is designed to eliminate

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f. 1 continued:
Securities Dealers of North America, Mr. Lichtenstein describes himself as a "dealer in inactive unlisted securities specializing in 'Cats & Dogs.'" Since Mr. Lichtenstein is blind, it would be impossible for him to make use of Level III of the NASDAQ system even if the NASD were to permit him to do so. The remaining two, E.M. North Co., Inc. and C.D. Pulis & Co., are long time antagonists of the NASD who, as a matter of principle, will not join the NASD under any circumstances. Most of the other brokers who fought the NASD over the years have finally given up and joined, among these being Murphy & Durieu, a prominent bond house, which joined the NASD shortly after the NASDAQ system came in to being and which now makes markets in numerous securities on NASDAQ. The newer firms all seem to join the NASD, Sloan being the exception to the rule.

all traces of this inappropriate regulatory interference with legitimate competitive forces. It is designed accordingly to assure that the power to control trading on exchanges is never again used to establish de facto membership requirements."

The validity of S.E.C. Rule 19b-2 had been challenged in PBW Stock Exchange v S.E.C. 485 F. 2d 718 (1973) and had also been attacked in public statements issued by the New York Stock Exchange as well as in briefs filed by the Department of Justice. This would, in part, explain the criticism leveled at the S.E.C. in the Senate Report. However, the Securities Acts Amendments of 1975 opens the door to attacks on other S.E.C. policy determinations. Among other things, Section 3(a)(9) of the Exchange Act is amended to define the term person as "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." Formerly, the term person was defined as "an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization." This change is significant because many sections of the Exchange Act authorize the bringing of suits against "persons." Section 21(f) of the Exchange Act, as amended, gives the United States District Courts "jurisdiction to issue writs of mandamus, injunctions, and orders commanding any person to comply with the provisions of this title...." In J.I. Case Co. v Borak 377 U.S. 426, 432 (1964) the Supreme Court held that Section 21 establishes a private right of action. Thus, the S.E.C., as a person, can be sued in the same manner as any other person.

The effect of these amendments is to destroy the argument advanced by the S.E.C. that it possesses a sovereign immunity from suit. If there remains any doubt on the matter, page 37 of Senate Report No. 94-75 says:

"The bill's major innovation in the area of judicial review relates to S.E.C. rule making. At the present time there is no provision for statutory review of Commission rules. Therefore, review of rules, to the extent that it is available, is pursuant to the Administrative Procedure Act (5 U.S.C. §702) and thus in the District Court. Section 25(b), as amended by the bill, would give to any person adversely affect-

ed a right to preenforcement review in the Court of Appeals of any rule promulgated under Sections 6, 11, 11A, 15(c)(5) - (6), 15A, 17, 17A or 19 of the Exchange Act - i.e., any provision directly relating to the operation or regulation of the national market system, a national clearing system, or the S.E.C.'s oversight of the self-regulatory organizations.

By establishing a scheme for the preenforcement review of rules, the Committee believes the bill would expedite final resolution of the major policy determinations the Commission will be called upon to make with respect to the national market system and the rationalization of the self-regulatory system. The changes, however, are not intended to change the existing law with respect to finality or standing in connection with pre-enforcement review of agency rulemaking. The Court of Appeals appears to provide the most appropriate forum for this review in light of the fact that the District Court's fact finding function is rarely necessary and the questions subject to review are likely to end up in the higher court anyway."

By stating that the enactment of the new Section 25 is not intended to modify existing law, Congress is undoubtedly referring to the fact that in a number of Supreme Court decisions it has been held that judicial review of agency action or inaction may be had in the United States District Courts. See Abbott Labs v Gardner 387 U.S. 136 (1967) (promulgation of regulation by FDA); Chicago v United States 396 U.S. 162, 166 (1969) (decision by administrative agency to terminate investigation); Tooahnippah v Hickel 397 U.S. 598 (1970) (disapproval of will); Oestereich v Selective Service System Board 393 U.S. 233 (1968) (revocation of draft exemption); NBC v United States 319 U.S. 190 (1942).

Although the new Section 25(a)(3) gives the Court of Appeals "exclusive jurisdiction," an exception is provided in Section 25(c)(3) which states that where review is sought in two different courts at once

> "that court in which the petition or action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 21(e) or (f) of this title is the same as by a court of appeals under this section."

This section leaves no doubt that the S.E.C. can be sued in the district court under Section 21(e) or (f) of the Exchange Act. It is particularly appropriate to make this point here because the case at the bar involves a situation where the transfer provisions of Section 25 apply. In particular, as Judge Griesa noted, "the plaintiff is engaged in combat with the S.E.C., which has taken a number of channels, of which this is only one." (A302-3). There are, at the present moment, seven proceedings pending in the United States Court of Appeals for the Second Circuit in which Sloan and the S.E.C. are on opposing sides. The others are Sloan v S.E.C. et al 75-4087 in which review is sought of the S.E.C.'s decision to revoke Sloan's broker dealer registration (see A323); S.E.C. v Samuel H. Sloan & Co. 74-1436 reported below as 369 F. Supp. 996 (1974); Sloan v S.E.C. 74-2457 in which review is sought of the S.E.C.'s orders of suspension of trading in Canadian Javelin Ltd.; S.E.C. v Canadian Javelin, Ltd. 75-7046 reported below as 64 F.R.D. 648 (1974) in which Sloan's motion to intervene was denied; S.E.C. v Sloan 75-7056 involving an appeal from a district court decision enjoining Sloan from violating S.E.C. Rules 15c2-11 and 17a-4; and S.E.C. v Sloan 75-6106 involving an appeal of a district court order holding Sloan in contempt of court. Another action in which the S.E.C. has indicated that it may file a brief is Sloan v Canadian Javelin Ltd. et al 75-7096, reported below in CCH Fed. Sec. Law Rep. ¶94,579 [1973-74 transfer binder]; a private suit in which the S.E.C. is not a party. Although these proceedings involve diverse questions of law and fact, several of them are interrelated in one way or another. In particular, the case at the bar is directly related to the administrative proceeding of which review is sought in Sloan v S.E.C. et al 75-4087. In the case at the bar, Sloan made a motion to enjoin the administrative proceeding. In his moving affidavit Sloan stated (A177):

> "(G) The plaintiff herein has been the target of one of these administrative proceedings which has been pending since April, 1972 and is still yet to be resolved. In an initial decision of March, 1973, Administrative Law Judge Ralph Hunter Tracy found in favor of the S.E.C.

(H) Ralph Hunter Tracy was and is an employee of the S.E.C. and, during his entire career as an administrative law judge, has, in each and every administrative proceeding heard by him, found in favor of the S.E.C. In other words, Ralph Hunter Tracy has never found in favor of the respondent in any administrative proceeding heard by him.

(I) Ralph Hunter Tracy is a career employee of the S.E.C. who was promoted to the job of administrative law judge after many years of service as a member of the S.E.C. staff."

It is submitted that these unconverted allegations constituted a sufficient showing to require an injunction enjoining the administrative proceeding. Although, Judge Griesa could perhaps have abstained until the administrative process was completed (see e.g. Rescue Army v Municipal Court 331 U.S. 549 (1947); Communist Party v Subversive Activities Control Board 367 U.S. 1, 72 (1961); Chandler v Judicial Council 398 U.S. 74, 86 (1970); Sampson v Murray 415 U.S. 61, 72 (1974)) the fact remains that the administrative process has now been completed and the issues raised in Sloan's motion to enjoin the administrative proceeding involve questions of fact which cannot be resolved from an examination of the bare record of that proceeding. Thus, if it can be shown that Ralph Hunter Tracy has consistantly displayed bias and prejudice against respondents in administrative proceedings brought by the S.E.C., or if it can be shown that Ralph Hunter Tracy could be discharged from his employment in retaliation for a decision unfavorable to his employers, or if it could be shown that the testimony of the two S.E.C. investigators who testified in behalf of the S.E.C. in that proceeding was in fact perjured or was given in utter disregard for the truth (see e.g. Napue v Illinois 360 U.S. 264 (1959)) or if it could be shown that evidence or testimony favorable to the defense was withheld (see e.g. Jencks v United States 353 U.S. 657 (1957); Giles v Maryland 386 U.S. 66, 75 (1967)); a question of whether the administrative proceeding had violated Sloan's Fifth Amendment due process rights would be involved. However, in order to adjudicate this question, it would be necessary for a court to make findings of fact and under §25 of the Exchange Act, the Court of Appeals on direct review of an

order of the S.E.C. has no jurisdiction to make such findings. On the other hand, the Court of Appeals, under the new §25(c)(3), can transfer the petition for review, which has been docketed under no. 75-4087, to the district court while at the same time remanding the instant action to the same court. In this manner, all pertinent questions of fact and law can be resolved by one district court judge, or by a three judge district court to the extent that constitutional issues are involved, with all parties preserving their statutory rights to appeal.

It is submitted then, that this action should be remanded and that simultaneously this court should transfer the review proceeding in 75-4087 to the district court. It is noteworthy that §25 provides that the Court of Appeals can do so sua sponte when the interests of justice require. This course would be far superior to letting all of the questions of fact involved in these proceedings be argued in briefs under circumstances where there is and can be no independent judicial fact finding. The customary role of the Court of Appeals is that of reviewing decisions by a district court and where ever possible, questions of fact, even those involving a prior administrative determination, should be presented to a district court in the first instance. There have been many cases where due process claims similar to those advanced by Sloan have been adjudicated favorably to the plaintiff. See Withrow v Larkin 421 U.S. 35, 50 n. 16 (1975) and the cases cited therein.

It is appropriate to make this argument here because one of the appellees has indicated that it may argue that the decision by the S.E.C. to revoke Sloan's broker dealer registration and to bar Sloan from being associated with a securities dealer has, in effect, extinguished Sloan's right to sue for injunctive relief. However, this argument, if advanced, would necessitate a remand for a fresh determination of the factual issues involved. In any event, this court in deciding this case must base its determination on the record here without presuming what the result will be in another case before this court

particularly since the final determination of that case might not be forthcoming for several years. Furthermore, the constitutional questions involved in the case at the bar are such that if Sloan wins here, the order of the S.E.C. for which review is sought in 75-4087 might well become a nullity.

There are other implications involved in the recent Securities Acts Amendments of 1975 but an in depth analysis is neither necessary nor appropriate here because, as has been show, this court must remand in any event. However, it should be pointed out that one effect of the Securities Acts Amendments of 1975 has been to give the S.E.C. the power to regulate "securities information processors" such as the NQB, Disclosure, Inc., and Bunker Ramo Corp. (see §11A) as well as clearing agencies such as the NCC (see §17A). It is difficult from the point of view of plaintiff to determine at present what effect this change in the law will have on the issues involved in this lawsuit but it is fair to state that the change is likely to be significant. For example, in the court below, the NQB argued that it was not subject to regulation by the S.E.C. However, it can make no such argument here. This circumstance again demonstrates the propriety of a remand. Any other result would involve a great waste of judicial time. Sloan would be free to institute a new suit to challenge the constitutionality of the Securities Acts Amendments of 1975 and a decision affirming the judgment entered in the court below would be futile. See Weinberger v Wiesenfeld 420 U.S. 636, 642 n.10 (1975). Therefore, the judgment of the district court must be vacated and this action must be remanded.

Of course, in cases involving a remand this court generally provides some guidance to the court below (see e.g. Gumer v Shearson, Hamm[illegible] Co., Inc. 516 F. 2d 283 (2d. Cir. 1974)) and, particularly in view of the present state of the record, this court should not hesitate to consider some of the other issues involved in this case.

POINT II

THE SECURITIES & EXCHANGE COMMISSION IS A SUABLE ENTITY.

In the court below, the S.E.C. argued (brief p. 8):

> "Congress has neither explicity nor impliedly consented that the Commission be sued, as distinguished from having its orders reviewed by the Court of Appeals and its rules challenged in Commission actions to enforce them."

In support of this proposition the S.E.C. cited a case it called Koss v S.E.C. 364 F. 2d 1312, 1327 n. 14. At oral argument Judge Griesa appeared to be a bit incredulous (A289/92). However, in the end it seems that he accepted this argument. (A309/10).

Judge Griesa's initial suspicions were correct. The case cited by the S.E.C. was fictitious. In the actual case, Koss v S.E.C. 364 F. Supp. 1321, 1327 n. 14 (S.D.N.Y. 1973), Judge Bauman stated:

> 14"The remaining arguments of the parties may be disposed of briefly. The S.E.C. argued that, under the rule expounded in Blackmar v Guerre, 342 U.S. 512 (1952), it could not be sued eo nomine - in short, that plaintiffs' complaint is fatally defective because it fails to name the individual Commissioners as defendants. Insofar as the Commissioners, if they are deemed essential parties to the lawsuit, may be readily joined under Federal Rule 19, this objection is frivolous.
>
> The S.E.C. also argued that plaintiffs lacked standing to challenge the staff comment letters because the letters were addressed to proposed issuers and not to plaintiffs. The adverse effect of the comment letters upon plaintiffs is undubitable, see FCC v Sanders Bros. Radio Station, 309 U.S. 470 (1940), as is their standing to litigate."

Thus, the decision on which the S.E.C. relied was, in the first place, not a Court of Appeals decision and, in the second place, reached precisely the opposite result from that which the S.E.C. claimed that it reached. An examination of the brief filed in the district court reveals many other instances of bad citations. It should be noted that the author of the brief filed in the district court in this case also wrote the brief filed in United Housing

Foundation, Inc. v Forman ______U.S. _____, 44 L. Ed. 2d 621, 635 n. 24(1975) which the Supreme Court found to be unworthy of any special weight.

In any event, the claim by the S.E.C. that it is immune from suit has been put to rest by the decision in Gordon v New York Stock Exchange _____ U.S. _____, 45 L. Ed. 2d 463, 483 n. 15 (1975) where the Supreme Court stated that "of course" judicial review of S.E.C. action is available. It should be noted that the claim of sovereign immunity and other claims either similar or identical to those advanced by the S.E.C. have been consistantly rejected by the District of Columbia Circuit, the Circuit which has most often had occasion to deal with this type of question. See Scanwell Laboratories Inc. v Shaffer 424 F. 2d 859, 873 (D.C. Cir. 1970), Medical Committee for Human Rights v S.E.C. 432 F. 2d 659 (D.C. Cir. 1970) dismissed as moot 404 U.S. 403 (1972); Constructor's Civiles de Centroamerica v Hannah 459 F. 2d 1183, 1191 (D.C. Cir. 1972); City of New York v Train 494 F. 2d 1033, 1038 (1974) aff'd. 420 U.S. 35 (1975).

The next argument advanced by the S.E.C. in the district court was that, treating the suit as one for money damages against the individual commissioners, the suit must be dismissed under the doctrine of official immunity for money damage liability. According to the S.E.C., the authority for this proposition is Barr v Matteo 360 U.S. 564, 571 (1959) and Howard v Lyons 360 U.S. 593 (1959). However, these two cases stand for nothing more than the proposition that one government employee may not sue another government employee for slander and defamation of character. In Wood v Strickland 420 U.S. 308 (1975) the Supreme Court rejected the contention that there exists an absolute official immunity from money damage liability. In O'Connor v Donaldson ___ U.S. ___, 45 L. Ed. 2d. 396, 408 (1975) the Supreme Court went a bit further and set forth what the charge to the jury should be in cases where a government official is sued for money damages for acts committed in his official capacity. From these decisions there can be no doubt

that the individual Commissioners can be sued for money damages. This result is not new. Long ago the case of Sloan Shipyards Corp. v United States Shipping Board Emergency Fleet Corp.258 U.S. 549 (1922) established that Government officials such as the S.E.C. commissioners here could be sued personally for tort committed while acting in their official capacity. Therefore, the only question is whether the complaint meets certain minimum pleading requirements, Scheuer v Rhodes 416 U.S. 232, 236 (1974), and it is obvious that in this case the requirements have been met. Even if the S.E.C. is correct in asserting that there is a pleading deficiency in that the individual commissioners have not been named as defendants, the plaintiff should be entitled to amend his complaint to correct this deficiency.

In the district court, the NASD argued that Scheuer v Rhodes did notapply because there the district court acted before even an answer to the complaint was filed whereas in the case at the bar answers were filed and both sides submitted affidavits and motion papers. It is submitted that there is no substance to this argument. Scheuer v Rhodes and the case at the bar are virtually indistinguishable and, in both cases, questions of fact are for a jury to decide. Furthermore, unlike the State of Ohio, the United States can be sued for money damages under the Tort Claims Act, 28 U.S.C. 2674. In short, the claim by the S.E.C. that it is immune from suit and that the other defendants, which are subject to regulation by the S.E.C., carry a similar immunity, is without merit.

POINT III

THE UNITED STATES DISTRICT COURT HAS BOTH THE JURISDICTION AND THE COMPETENCE TO DECIDE ALL OF THE QUESTIONS OF FACT AND LAW INVOLVED IN THIS CASE.

As noted previously, the complaint in this action was dismissed at the pleading stage. Although answers were filed and numerous affidavits, exhibits and other motion papers were submitted to the court, it appears that these documents played no part in the decision that the court reached. It appears that the only documents which the court considered were the complaint and the brief filed by the S.E.C. In fact it seems that the NASD is a bit unhappy at having made a considerable effort to prepare a brief which Judge Griesa apparently

never bothered to read.

The decision of the district court seems to be something to the effect that it does not have the jurisdiction and/or the competence to decide this case. It is difficult to be more precise in this regard because the decision of the district court is replete with sweeping statements such as "that's frivolous." On this point, it should be said that there is much to criticize in the procedure followed by the district court. The procedure was that Judge Griesa read an oral decision into the record (A300-314) and then endorsed the back of all the motion papers either with the words "motion granted, so ordered" or else "motion denied, see minutes of 2/14/75, so ordered" (see A184, A201, A205, A264, A268). The judgment in this case was signed and entered by the clerk (A270).

The judgment itself may be legally invalid in that it indicates that the court handed down a memorandum, whereas in reality the court read an oral decision into the record. In any event, it is submitted that in this case the act of reading the oral decision into the record was an abuse of judicial discretion. The decision was 14 pages long. It left the unmistakeable impression that Judge Griesa was speaking off-the-cuff. Furthermore, it makes plenary appellate review nearly impossible. In fact, the decision is such that the court of appeals would be justified in summarily reversing the court below with instructions that this case be assigned to another judge with instructions to reconsider the motions presented. United States v John Anthony Taylor 487 F. 2d 307 (2d Cir. 1973).

There are undoubtedly instances where it is appropriate for a district court judge to read his decision into the record but this is not one of them. Oral decisions constitute a hinderance to appellate

review. In addition to the time and money involved in obtaining a copy of the transcript, there is a significant likelihood that the court reporter will make an error, and even a minor error could destroy any value the courts' decision might have for purposes of appellate review. In addition, for policy reasons, oral decisions should be discouraged by the appellate courts. When a district court judge makes an oral decision, he can be certain that the decision will not be published. This saves the judge from considerable embarrassment if he happens to be reversed by the court of appeals. The policy of permitting oral decisions may deprive the world of the opportunity to read the handiwork of an incompetent judge. Therefore, when a judge feels that he is likely to be reversed, or when he makes a bad decision which he would prefer not to see published, he is more likely to make the decision orally. Judges should be given as little opportunity as possible to make bad decisions. The principal coercive force which encourages a district court judge to do his best to make the legally correct decision lies in the fact that if he does not do so, the Court of Appeals will inform him publically that he is wrong. Chandler v Judicial Council, supra 398 U.S. at 101 (Harlan, J., concurring). It is submitted that in the case at the bar there is absolutely no authority for a dismissal of the complaint and therefore if Judge Griesa had been required to present in writing cogent reasons for his decision he would have had no choice but to arrive at the opposite result from that which he achieved. Therefore, plaintiff has suffered prejudice by virtue of the fact that Judge Griesa did not give in writing his reasons for dismissing the complaint.

The decision of the court below purported to rely principally upon Ricci v Chicago Merchantile Exchange, supra. However, Ricci is certainly not authority for the proposition that the complaint

should be dismissed. In Ricci the Supreme Court affirmed a Court of Appeals decision which directed the district court to stay further proceedings to permit administrative action by the Commodity Exchange Commission. The decision clearly indicated that once the Commodity Exchange Commission had completed administrative action or, in the alternative, had decided that no action would be taken, the proceeding in the district court would go forward. 409 U.S. at 306. Indeed, it is clear that the decision in Ricci is of no aid to the defendants and is, in fact, helpful to the plaintiff in this case. It is true that the dissenting opinions in Ricci would, if followed, be even more helpful to the plaintiff than is the court's opinion, but is is apparent that all nine Supreme Court justices are in agreement that the district court's decision there to dismiss the complaint was erroneous.

The decision of the court below referred specifically to footnote 13 of Ricci (A310). That footnote was also cited in the brief of the S.E.C. According to the brief of the S.E.C. the Supreme Court in footnote 13 recognized that "it is necessary to conclude that Congress intended to exempt from the antitrust laws activity subject to the administrative agency's adjudicative or rule-making authority." This citation, like the citation to Koss v S.E.C. ante p. 27, is false. In footnote 13 of Ricci, the Supreme Court decided precisely the opposite from what the S.E.C. said that it decided.[2] In fact, from reading footnote 13, 409 U.S. 302-303, three points are readily apparent. They

2. In other briefs filed in this court the appellant has found it necessary to point out instances in which the S.E.C. has made fraudulent citations. For example, in S.E.C. v Canadian Javelin Ltd., Reply Brief for Appellant, Sloan demonstrated that by claiming that in S.E.C. v Capital Gains Research Bureau, Inc. 375 U.S. 180, 193 (1963) the Supreme Court had established that the "mild prophylactic" of injunctive relief should be readily available to the S.E.C., the S.E.C. had made a fraudulent claim. This should serve to provide this court with notice that claims made by the S.E.C. should be examined carefully before being relied upon. A lesson from recent history is appropriate. In United States v United States District Court 407 U.S. 297 (1972), in what appears to have been a departure from usual practice, the case of the Government was argued by one Robert C. Mardian who was then Assistant Attorney General. Mardian argued that it was within the broad discretionary power of the President to authorize the use of electronic surveillance to protect the national security. A decision, unfavorable to Mardian, was handed down by the United States Supreme Court on June 19, 1972. On June 17, 1972 five persons were

are (1) the defendants to this action can be sued under the antitrust laws (2) the assertion by the S.E.C. to the contrary is false and (3) Judge Griesa did not read the case on which he based principal reliance prior to making his decision.

The best result the defendants could possible hope to obtain from Ricci would be a temporary stay of proceedings pending an administrative determination. However, it is obvious that a stay would not be appropriate here. For one thing, the S.E.C. has apparently made every administrative determination it intends to make. More than seven months have passed since Judge Griesa made his decision and the S.E.C. has not made use of any authority it may have had under what used to be §15A(k)(l) of the Exchange Act to abrogate any rule of the NASD, such as the compulsory arbitration rule, or to conduct hearings concerning the rates charged for entry into the NASDAQ system or the availability to non-NASD members of Level III NASDAQ. Furthermore, the S.E.C. has instituted proceedings against Sloan in the district courts on three occasions and, in so doing, has in effect admitted that the courts have all the expertise necessary to resolve any factual disputes between Sloan and the S.E.C. This court is fully competent to adjudicate any question involving federal securities law and federal antitrust law and consequently there is no need to take advantage of any supposed expertise the S.E.C. might have. In a dissenting opinion by Mr. Justice Blackmun in Blue Chip Stamps v Manor Drug Stores ___U.S.___, 44 L.Ed. 2d 539, 564 (1975) this court was referred to as the "Mother Court" in the area of interpreting the 1933 and 1934 Securities Acts. It would be startling for this Court to declare that it is incompetetant to decide a question of federal

(f. 2 continued)
arrested while attempting to install electronic surveillance devices in the headquarters of the Democratic National Committee at the Watergate office building in Washington, D.C. On March 1, 1974 a federal grand jury handed up an indictment which charged Mardian among others with conspiracy to obstruct justice in connection with the Watergate cover-up case. On January 1, 1975 a jury found Mardian to be guilty on all counts. These events are not necessarily remote from the circumstances of the instant case. In his brief filed in 74-1436, p. 68, Sloan argued that the facts of that case are such that the S.E.C. attorneys in question should go to jail. It is submitted that if the wall of immunity which the S.E.C. claims to exist can be pierced, that very result will be likely to occur.

securities law unless there has been a preliminary referral to the S.E.C. Such a declaration might lead to a conclusion that any private party that wanted to sue an entity subject to regulation by the S.E.C. must first refer the matter to the S.E.C. for preliminary adjudication.

In short, all of the claims advanced by the S.E.C. that the district court lacks subject matter jurisdiction or that, by implication, the district court lacks competence must be rejected.

POINT IV

PLAINTIFF CANNOT BE REFERRED TO HIS ADMINISTRATIVE REMEDIES BECAUSE NO ADMINISTRATIVE REMEDIES EXIST.

One of the arguments advanced by the S.E.C. in the court below was that the plaintiff had failed to exhaust his administrative remedies. In this regard, it cited eight cases which stand for the proposition that court review must await exhaustion of the administrative process. However, at oral argument before Judge Griesa, the court inquired as to what administrative remedies were available, to which counsel for the S.E.C. replied:

"I am not sure if we briefed that particular point, your honor (A291)."

The failure to brief that particular point was not due to an oversight but rather was due to the fact that there is no administrative remedy. This point becomes obvious from PBW Stock Exchange v S.E.C., supra where the stock exchange protested against the adoption of S.E.C. Rule 19b-2, participated in extensive hearings before the S.E.C. and then, after the administrative process had been completed, filed a petition for review in the United States Court of Appeals for the Third Circuit. The Court of Appeals granted a motion by the S.E.C. to dismiss the petition for lack of jurisdiction and stated that if the stock exchange wanted to challenge the rule in question it should violate the rule and wait for the S.E.C. to institute enforcement proceedings. Thus, it is apparent that the claim that Sloan,

should proceed first to the S.E.C. and then to the Court of Appeals is made in bad faith. Had Sloan done so, he would have run into the same dead end that was encountered by the PBW Stock Exchange.

Judge Griesa, who apparently was aware that this problem might arise, inquired at oral argument as to the proper route which one must take in order to challenge an S.E.C. rule (A293). The response by counsel for the S.E.C. was "I am not sure that question is specifically answered your honor." (A293). However, the answer, according to the S.E.C., seems to be that one is required to violate the rule and wait for the S.E.C. to institute civil, criminal or administrative proceedings.

It is easy to understand that the S.E.C. would want all of its legal adversaries to be required to await prosecution prior to challenging the validity of any administrative regulation. However, the position taken by the S.E.C., if accepted by the courts, would lead to constitutionally impermissible result. One is reminded of the words of Dante Alighieri in the "Divine Comedy." According to that work, upon the Gate of Hell is inscribed the words:

> "I AM THE WAY INTO THE CITY OF WOE
> I AM THE WAY TO A FORSAKEN PEOPLE
> I AM THE WAY INTO ETERNAL SORROW
> ....
> ABANDON ALL HOPE YEE WHO ENTER HERE."

However, Dante Alighieri, as the story goes, went through the Gate of Hell and survived the ordeal, but only through an act of divine intervention.

Thus, the way, according to the S.E.C., to challenge the validity of an S.E.C. rule is to proceed through the Gate of Hell and to hope for an act of divine intervention such as, for example, a Court of Appeals determination that the authority of the S.E.C. to make the rule in question is constitutionally invalid. Since the Court of Appeals has yet to do this in a single case, it seems only appropriate that one "abandon all hope" while waiting

for this process to take place.

In Steffel v Thompson 415 U.S. 452, 468 n 18 (1974) the Supreme Court considered this problem and quoted one commentator who said:

> "It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff at his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality."

According to the S.E.C., the plaintiff in this case has, unwittingly perhaps, taken precisely the route which, according to the S.E.C., is the only route available to one who wishes to challenge the validity of an S.E.C. rule. As noted previously, Sloan has been forced to defend in two injunction proceedings, one administrative proceeding and one contempt proceeding, all based on claims by the S.E.C. that he violated various S.E.C. rules. In addition, Sloan has been harassed by the S.E.C. almost continuously for nearly five years. At the end of all this when Sloan finally gets around to suing the S.E.C., the S.E.C. contends that Sloan lacks "standing to sue," that he must await exhaustion his non-existant "administrative remedies" and that he can only challenge the validity of the specific rules which the S.E.C. claims that he has violated and then only in as a defensive allegation in the context of an enforcement proceeding brought by the S.E.C.

It is submitted that the fact that Sloan is defending on constitutional grounds in the actions brought against him by the S.E.C. does not preclude Sloan from maintaining this suit. Sloan is also defending the actions brought by the S.E.C. on the grounds that these suits cannot be maintained because of insufficiency of the evidence, because of the failure of the complaint to state a claim and because of other factors which have little to

do with the constitutionality of the statute and the rules involved. The case at the bar involves an entirely different set of facts than those cases. (A-183). Furthermore, all constitutional questions are always open. Erie R. Co. v Tompkins 304 U.S. 64 (1938).

It has been established ever since Railroad Retirement Board v Alton R.R. 295 U.S. 330 (1935) and Carter v Carter Coal Co. 298 U.S. 236 (1936) that under appropriate circumstances pre-enforcement injunctive relief can be obtained which enjoins the enforcement of a federal statute. These decisions have never been overruled. They are cited with approval in Rule 20 of the Rules of the Supreme Court as examples of cases of such imperative public importance as to require immediate settlement by the Supreme Court.

If,for example, the S.E.C. decides to raise its minimum net capital requirement, as it did recently, any broker who is adversely affected by this change must either (1) go out of business or (2) violate the rule and wait for the S.E.C. to institute civil, criminal or administrative proceedings. It is submitted that this is unconstitutional. Similar if not identical claims to those advanced by the S.E.C. were advanced by the Government in Youngstown Sheet & Tube v Sawyer 343 U.S. 579 (1952) and yet the Supreme Court did not hesitate to enjoin the enforcement of an unconstitutional order even though it could have readily decided the case on onconstitutional grounds.

The best result the S.E.C. could possibly hope to achieve would be based upon Yakus v United States 321 U.S. 414 (1944). Although that decision would appear at least initially to be helpful to the S.E.C., since the court refused to enjoin enforcement of a criminal statute on constitutional grounds where a clear administrative remedy was available, the application of Yakus to the circumstances of this case leads to the result that S.E.C. Rule 15c2-11 and several other rules challenged in this

lawsuit are invalid on non-constitutional grounds. See <u>United States</u> v <u>Robel</u> 389 U.S. 258, 274-275 (1967) (Brennan, J., concurring).

As noted previously, there is no administrative remedy available to Sloan. Even the newly amended version of §25 of the Exchange Act does not provide an administrative remedy to Sloan because under §25 the validity of a rule must be challenged within sixty days after the promulgation of the rule. Rule 15c2-11 and the other rules which are attacked in the complaint were promulgated more than 60 days before the Securities Acts Amendments of 1975 became effective. However, assuming arguendo that an administrative remedy was available, Sloan should not be required to spend the next two or three years pursuing that remedy when Sloan contends that the Administrative Procedure Act itself is constitutionally invalid. For example, one of the objections that Sloan has made to the administrative procedures adopted by the S.E.C. lies in the fact that administrative law judges such as Ralph Hunter Tracy are not appointed for life, as is required by Article III, Section 1 of the Constitution, but instead can be hired and fired in the same manner as any other federal employee. The validity of this objection finds support in no less an authority than the Declaration of Independance. In reciting the history of repeated injuries and usurpations of the King of Great Britain, "all having in direct object the establishment of an absolute tyrrany," the Declaration of Independence stated:

> "He has made judges dependant on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

It is submitted that there can be no doubt that any Act of Congress which vests judicial type power in the office of administrative law judge is unconstitutional. No valid purpose would be served in requiring Sloan to pursue an elusive if not non-existant administrative remedy when the entire administrative procedure as applied to this case can be seen to be invalid on relatively obvious constitutional grounds.

In Oestereich v Selective Service Board, supra 393 U.S. at 242 the Supreme Court said:

> "A challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the [administrative agency] to hear and determine. Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. See Public Utilities Comm'n v United States, 355 U.S. 534, 539 (1958); Engineers Public Service Co. v S.E.C. 138 F. 2d 936, 952-953 (D.C. Cir. 1943), dismissed as moot 332 U.S. 788."

The NASD, like the S.E.C., argued that Sloan had failed to exhaust his administrative remedies and, unlike the S.E.C., made a specific suggestion as to what that administrative remedy was. According to the NASD, Sloan could file a "petition to the Commission to institute abrogation proceedings." However, the filing of such a petition is not authorized by statute or rule and the NASD could point to only one instance where such a petition had ever been filed. That case involved a request by Aetna Life and Casualty Company and two broker-dealer subsidiaries, none of which were NASD members, to abrogate an "interpretation" by the NASD of one of its rules in the underwriting area. In essence, Aetna Life and Casualty Company was seeking a ruling to the effect that NASD members could receive a selling discount from non-NASD members for the sale to the public of mutual funds underwritten by the non-NASD members, i.e. the two subsidiaries of Aetna Life. After three years of protracted hearings before two administrative law judges followed by a final decision by the S.E.C., favorable to Aetna, followed in turn by the filing of a petition for review in the District of Columbia Circuit which resulted in a summary affirmance (see NASD v S.E.C. 486 F. 2d 1314 (D.C.Cir. 1973)), Aetna finally got its wish. However, by that time it was 1973 and the sizzling market for new issues and mutual funds which existed in 1968 and 1969 had long since dissipated. Surely that case is not authority for anything.

The claim that Sloan should be required to pursue his administrative remedies is entirely frivolous for a variety of other reasons which need not be pursued at length. For one thing, even if there were an administrative remedy available and even if Sloan were to file a "petition to the Commission to commence abrogation proceedings" which the NASD (but not the S.E.C.) claims he can do[3] and even if the NASD were ultimately to permit Sloan to bid and offer securities in competition with other brokers and dealers, this circumstance would not enable Sloan to recover damages occasioned by the violations of anti-trust law involved in the operation of the NASDAQ system during the years 1971-74.

The S.E.C. is apparently prepared to concede that there is no administrative remedy available to Sloan. Perhaps, then, the S.E.C. is arguing that Sloan must first request the S.E.C. to create an administrative remedy prior to coming to court.[4] However, Congress has not given the S.E.C. the general power to create administrative remedies. If it were to do so the S.E.C. could create an administrative remedy involving five appeals to four boards with initial and final decisions at each level and with repeated hearings and re-hearings. In this way the S.E.C. could accomplish what seems to be its purpose of defeating all judicial review of S.E.C. action.

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3. Of course, the S.E.C. would be under no obligation to act on or even respond to such a petition and the S.E.C. could just as well "file" such a petition in its circular file, i.e., in it's trash basket.

4. Sloan v S.E.C. U.S.C.A. docket no 74-2457, which challenged the constitutional validity of various suspensions of trading in Canadian Javelin Ltd., the S.E.C. argued in its brief that Sloan had failed to pursue administrative remedies. However, at oral argument, counsel for the S.E.C. conceded that no administrative remedy existed. Nevertheless, counsel for the S.E.C. persisted in its claim that Sloan should pursue his administrative remedies anyway. It appeared from the argument presented that counsel for the S.E.C. was claiming that Sloan should first be required to request the S.E.C. to create an administrative remedy where none at present exists. However, it is obvious from PBW Stock Exchange v S.E.C., supra that such a request would be futile.

Since Sloan has already defended in an administrative proceeding before the S.E.C., it is hard to see what purpose would be accomplished by requiring Sloan to attempt to institute another administrative proceeding. Furthermore, the S.E.C. can give no cogent explanation for its argument that a hearing should be held before an S.E.C. administrative law judge rather than before a United States District Judge. The S.E.C. has already stated that it will not adjudicate any constitutional questions presented in administrative proceedings before the S.E.C. (A-320, n.23) even though the S.E.C. commissioners, prior to taking office, are required to swear to uphold the constitution.

In addition, neither an administrative law judge nor an administrative agency has the power to decide a case or controversy. Justice Holmes in <u>Prentis</u> v <u>Atlantic Coast Line Co.</u>, 211 U.S. 210, 226 (1908) defined a "judicial inquiry" as one that "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist" as contrasted to legislation, which "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." In <u>Chandler</u>, <u>supra</u>, a conclusion was reached that administrative action was legislative rather than judicial in character. Thus an administrative remedy, if it existed by statute, would not exist in fact since neither an administrative law judge nor the S.E.C. itself would have the power to remedy a past wrong.

There can be no question that under <u>Prentis</u> the orders of an administrative agency are legislative rather than judicial in character. Therefore, a requirement that an aggrieved person, prior to seeking judicial relief, must apply to the S.E.C. for relief from its own order would be equivalent to a requirement that one must apply to Congress for the repeal of an Act of Congress prior to asserting the unconstitutionality of that Act in a court of law. For example, in the case at the bar, the S.E.C. has made it

illegal for persons to buy and sell shares of various securities. Clearly, this act is legislative rather than judicial in character. An application to the S.E.C. itself from relief from its orders of suspension of trading would be futile. Moreover, if such an application raised all of the issues presented in this proceeding, Sloan would, in effect, be seeking from the S.E.C. an admission of the illegality of its own prior conduct. Ricci v Chicago Merchantile Exchange, supra 409 U.S. at 309 (1973) (Douglas, J., dissenting). In addition, this course would trap Sloan into seeking a binding adjudication from a body which he contends is unconstitutionally constituted and that body could spend the next several years making up its mind while, in the meantime, the exhaustion doctrine would truly apply. Consequently, the argument that Sloan has failed to exhaust his administrative remedies and is presenting constitutional questions to this court prematurely is without merit. Public Utilities Comm'n v United States, 355 U.S. 534, 539 (1958). United States v Radio Corporation of America 358, U.S. 334, 346 n. 14 (1959); United States v Western Pacific R. Co. 352 U.S. 59, 63, 64 (1956).

It must also be said that it is unlikely that the S.E.C. would provide a fair and impartial tribunal in any case involving Sloan. The S.E.C. has sued Sloan twice, has brought an administrative proceeding against Sloan, and has attacked Sloan's character and personality on numerous occasions in briefs and other documents filed in various courts. For his part, Sloan has sued the S.E.C., has charged various S.E.C. attorneys with subordination of perjury and other forms of criminal misconduct and has asked the courts to hold the individual commissioners in contempt of court and to bar them from the practice of law. Under these circumstances, the probability of actual bias on the part of the S.E.C. is too high to be constitutionally tolerable, Withrow v Larkin, supra 421 U.S. at 46, 47, and therefore this matter should

not be referred for preliminary adjudication by the S.E.C. even assuming such an adjudication could be had.

POINT V

THE DEFENDANTS ARE LIABLE TO PLAINTIFF UNDER FEDERAL ANTI-TRUST LAW.

A disproportionate part of this brief has already dealt with immunity claims and other related claims advanced by the S.E.C. and the NASD. This has been necessary because it is upon these claims that the defendants prevailed. It should not be forgotten, however, that there are five other defendants in this case. This brief will attempt to deal with some of the issues of fact and law with respect to these defendants. At the same time, the purpose of this brief is to demonstrate that this action should be remanded. Therefore, the fact that a particular point which is raised in the pleadings or in the motion papers presented in the court below is not briefed here does not mean that that point has been abandoned. Instead, it means that the briefing of that particular point is not deemed necessary at this time.

In the court below, the NASD submitted an affidavit of John H. Hodges, Jr. (A-135) with exhibits attached which included a glowing description of how the NASDAQ system benefits the investing public. However, Sloan filed an affidavit which strongly disputed that point and claimed that the "glorified version of the way the NASDAQ system is supposed to work..., fails to describe the way the NASDAQ system actually operates...." (A219-220). Since this involves a factual question which probably cannot be resolved on affidavits, no attempt will be made to show, for example, that Sloan is correct and Hodges in wrong. Instead, it will be argued that the operation of the NASDAQ system is a violation per se of federal anti-trust law.

A recent case, Shumate & Co., Inc. v NASD 509 F. 2d 147 (5th Cir. 1975) cert. denied ______U.S. ______ (decided 10-6-75), involved a claim

that the operation of the NASDAQ system violated anti-trust law during an eight month period from February 8, 1971 until October 18, 1971. During this period the NASD would not permit securities that were listed on the New York or American stock exchange to be quoted on NASDAQ. In Shumate, after a five day jury trial, the district court found evidence of violations of anti-trust law sufficient to present a jury question but, at the same time, found no evidence that Shumate had sustained injury and therefore entered judgment against Shumate.

Mr. Shumate, it seems, is the sole stockholder of a broker dealer located in Texas. Shumate has never been a market maker in securities. It is clear for a variety of reasons that need not be analyzed in detail that the defects in the action brought by Shumate are not present here. For one thing, Shumate was a member of the NASD and could have subscribed to NASDAQ at any time but chose not to do so until early 1973. Although Shumate indicated a desire to become a market maker in two securities on NASDAQ in early 1971, he never followed through with his intention when the opportunity became available. Perhaps Shumate was under the impression that anybody could become a market maker in securities. It is true that the field is wide open, or at least it was open before the NASD started to require brokers to become "registered market makers," but the fact is that a relatively small number of individuals have demonstrated the combination of skills and talents required to become a market maker and to make trading profits on a consistant basis.[5]

The market making function in the pre-NASDAQ days is perhaps best exemplified in the Wall Street Journal article found on pages A221-2 of the

5. New NASD rules establish experience requirements and other requirements in order to become a "registered market maker." One wonders whether Sloan, who has been a market maker for five years but not as a NASD member, would meet those requirements.

appendix. This article describes the "constant battle of wits, sharp bargaining and frenetic cat-and-mouse games of the over-the-counter market." (A221). It is not surprising that this area of the securities industry, which is traditionally one of the most profitable, would attract the attention of low-brow bureaucrats who lack the talent necessary to be able to make markets themselves and therefore have no concept of the creative process involved in market making. The attitude of these bureaucrats is demonstrated by a recent decision of an S.E.C. administrative law judge in The Matter of Peter Caplin; Gotham Securities Corp. CCH Fed. Sec. Law Rep. ¶80,239 at p. 85, 497 [1974-75 transfer binder] which explained S.E.C. rules such as Rule 15c2-11 as necessary to control the "irresponsible numbers game" characteristic of market making activities.

There can be no question that the NASDAQ system has done much to eliminate the fierce competition inherent in the "irresponsible numbers game" so distasteful to the S.E.C. Cut-throat traders like Freddy Ritt (A221) now occupy their time by pushing buttons in order to insure that their markets are in line with those of the other "market makers." If not, they are likely to get a call from the NASD with a complaint that their markets are too high, too low, too wide or otherwise not in accordance with the NASD's concept of how markets should be made.

The operation of the NASDAQ system unquestionably involves a combination or conspiracy in restraint of trade. Specifically, the NASD has a contract with Bunker Ramo Corp. The contract is not part of the record in this case and without it a comprehensive analysis of the violations of anti-trust law involved is not possible. However, it is fair to say that the contract creates a scheme similar to that described in Goldfarb v Virginia State Bar ___ U.S. ___, 44 L. Ed. 2d 572 (1975). This occurs because the NASD Uniform Practice Code requires that a broker attempt to get the best price for his customer and, in practice, in order to do so the broker

must subscribe to the NASDAQ system. Thus, it becomes "unethical" for a broker not to make use of NASDAQ and a broker who engages in unethical conduct can be fined, suspended and/or expelled from the NASD.

This also freezes out Sloan who has wisely abstained from joining the NASD.[6] The rates charged by Bunker Ramo Corp., which acts as agent for the NASD, are manifestly unfair to small brokers and dealers. For example, it costs less in practice to subscribe to six machines than it costs to subscribe to one machine. However, a small broker dealer cannot save money by ordering five extra machines because of prohibitive installment charges. In addition, one of the features of the NASDAQ contract which all subscribing brokers are required to sign is that the NASD has the power to raise the rates unilaterally at any time. The unfortunate broker is powerless to protest and must continue to pay his subscription fee if he wants to stay in business. One of the unilateral price changes brought about by the NASD has been the introduction of the practice of charging $.10 per quote. As a result, brokers who originally were led to believe that they were purchasing a service with a maximum charge of $400 per month found themselves paying as much as $2,500 per month for the same amount of use. The result has been insolvency and financial ruin for a large number of small and middle sized brokers and dealers. In such cases, Bunker Ramo Corp., as the collection agent for the NASD, has not hesitated to institute suit. In one day alone, the New York Law Journal reported that Bunker Ramo Corp. had obtained money judgments against two small broker dealers. These judgments were each in the vicinity of $20,000. (A215). It is for this reason that virtually every small broker dealer specializing in over-the-counter securities has been forced out of business since the time the NASDAQ system came into existance. Parenthetically, it should be said that this result has been deliberate. The NASD and the S.E.C. have issued numerous policy statements which have stated that a plan was in effect to drive out of

6. This has occurred at the cost of constant harassment by the S.E.C. It is noteworthy that the Exchange Act prohibits the S.E.C. from seeking injunctive relief against a NASD member unless or until the NASD has demonstrated an unwillingness to act to correct the situtation. Thus, had Sloan been a member of the NASD, the S.E.C. would have been prohibited by law from seeking the two injunctions it has obtained against Sloan.

business all small "under-capitalized" brokers and dealers.

The generally accepted explanation for this development has been that there has been a "bad Market" for the past seven years. This, of course, is not true. Although the most profitable year for over-the-counter market makers was 1968, the fact is that trading volume has substantially increased since that time. Profits in the over-the-counter markets should logically vary according to the volume of trading. Therefore it seems illogical that profits should be decreasing and competition lessening at a time when volume is on the upsurge. The explanation for this seemingly incorgruous situation is that the operation of the NASDAQ system is a multi-million dollar proposition and almost all of the money required to operate the system comes directly out of the pockets of the market makers. Since market makers cannot afford to operate at a loss the ultimate loser must inevitably be the public customer.

In addition to the unfair practices involved in the pricing of the NASDAQ system, the system itself is an ideal price fixing mechanism. In the NASDAQ system all markets are displayed simultaneously on what resembles a television screen. Any market maker who wants to change his market can press a few buttons and the new market appears. Every market maker gets to see the market of all of the other market makers. The result is inevitable. In practice, either all the market makers make the same market or else the market makers decide to "work together" in which case the appearance is created of differing or competitive markets. In reality, however, the brokers are doing what is known as "holding hands." "Holding hands" is a practice which, in any other industry, would be called price fixing.

It should be said that NASDAQ represents a marvelous technological advance and if put to proper use it could revolutionize the securities industry and greatly benefit the public. However, NASDAQ is not presently being put to

proper use. The fact is that NASDAQ can find no practical application in the negotiated market. The proper application for NASDAQ would be in the action market. By one simple rule change a complete conversion could be effected. That rule change would be to permit a broker to enter a one sided quotation. At present, entry into the NASDAQ system is restricted to so-called "registered market makers" who agree to make a continuous two sided market. Consequently, a broker who holds a customer order to buy at a price below the lowest offering price but above the best bid price is forced to wait until the market price goes down before he can fill his order. However, if that broker were permitted to advertise his best bid price directly on NASDAQ his customer order would probably be filled immediately and his customer would be much more likely to make a profit. This change, which could be accomplished easily, is so simple and elegant that one wonders why it has not been implemented already. The answer, of course, comes quickly. If brokers were permitted to enter their one sided bid and asked quotations directly on NASDAQ, the New York Stock Exchange and the rest of the stock exchanges would be put out of business overnight. They would not, however, be put out of business by rule or regulation or government interference. Rather, they would be put out of business by competition from a superior, more effecient and more technologically advanced method of trading securities. At the same time the system, being more efficient, would bring about great cost savings and brokers would not have to fear that the cost of the NASDAQ system might drive them out of business. In addition, since the NASDAQ machine is, in reality, a computer terminal, transactions themselves could be recorded in the computer and the NCC with its continuous net settlement system could automatically settle trades on a nation wide basis. Since the NCC itself would be able to keep the records for a broker it would not be necessary to hire a tremendous clerical staff and most of the paper work which is involved in the brokerage business would be eliminated. All of this would come about, not by an Act of Congress, but by letting the free market forces take over.

Bunker Ramo Corp. occupies an obscure position in this lawsuit. Although the notice of motion of the NASD (A137) indicates that Bunker Ramo Corp. is moving to dismiss or, in the alternative, for judgment on the pleadings, none of the affidavits or exhibits presented to the court made more than a cursory mention of Bunder Ramo Corp. In addition, the brief of the NASD made no mention of Bunker Ramo Corp. except to say that the NASD had, as part of its contract with Bunker Ramo Corp., agreed to defend in any anti-trust suit brought against Bunker Ramo Corp. related to the operation of the NASDAQ system. In a motion to dismiss or for summary judgment in an anti-trust case, the burden is unquestionably on the defendant to show that no fact can be found which demonstrates a violation of anti-trust law. Umdenstock v American Mort. & Invest. Co. 495 F. 2d 589, 592 (1974). This citation is particularly relevant here because, at a premotion conference on January 10, 1975, Judge Griesa solicited motions to dismiss and stated that there would be no discovery until these motions had been decided. Thus, there has been so opportunity for discovery in this case and the contract between the NASD and Bunker Ramo Corp. is therefore not before this court. Since Bunker Ramo Corp. has made no effort to meet the burden of showing that no violation of anti-trust law has occurred, the judgment of the district court should be reversed.

The same argument applies to the NQB. However, here the factual issues are somewhat different. The complaint alleges, in part,a refusal to deal with Sloan. However, this refusal to deal has not been absolute. In fact, for most of the time from June of 1970 until May of 1975 Sloan was a subscriber to the NQB. The complaint alleges that on August 16, 1973, the NQB unilaterally cancelled Sloan's subscription to the "pink sheets" published by the NQB. (A41). The NQB claims that this occurred solely because Sloan was behind in the payment of his bills. (A150). This explanation, however, is not credible. The NQB has refused to support its claim of delinquency in the payment of bills by

providing Sloan with any documentation. (A236). In fact, the NQB bills its clients six months in advance and documentary evidence establishes that Sloan paid the NQB $2,073.57 on June 4, 1973. (A238).

It is obvious that the supposed failure to pay a bill was, at best, an excuse to kick Sloan out of the pink sheets on August 16, 1973. It is hardly a coincidence that on August 16, 1973 two employees of the S.E.C., Jerome Selvers and Sheldon Kanoff, unexpectedly entered Sloan's office and accosted his secretary, Helga Thorvardardottir. (A42, ¶140). In other words, it is reasonably apparent that the NQB kicked Sloan out of the pink sheets, not because of a supposed failure to pay a bill, but because of a communication between the S.E.C. and the NQB on August 16, 1973.

In December, 1974, Sloan paid the NQB $1,755.87, under protest, and paid an additional $436.32. The NQB then reinstated Sloan in the pink sheets. However, the NQB refused to accept listings from Sloan in certain securities unless Sloan submitted a Form 211 in those securities. As a result, Sloan submitted approximately 350 Forms 211 to the NQB. The NQB forwarded these Forms 211 to the S.E.C. and the S.E.C. instituted suit against Sloan. Two appeals in that suit are pending before this court under U.S.C.A. docket numbers 75-7056 and 75-6106. On December 30, 1974 the S.E.C. obtained a temporary restraining order against Sloan and, the next day, served a copy of this order on the NQB. (A153). The obvious purpose of this service was to coerce the NQB to cancel Sloan's subscription to the pink sheets. That day, the NQB not only expelled Sloan from the pink sheets but caused its computer to erase any memory of prices previously submitted by Sloan. For this reason, when the NQB subsequently published its Monthly National Stock Summary, all of Sloan's markets which had previously been published by the NQB failed to appear.[7]

7. The latter fact cannot be found from the record because the National Stock Summary in question was not actually published until after all motion papers had been submitted to Judge Griesa. This fact is included here because it becomes obvious that the injury to Sloan resulting from

(footnote cont. p. 43

On January 10, 1975, Judge Griesa signed an order directing the NQB to show cause why it should not be enjoined from refusing to accept Sloan's listings in the pink sheets (A130). Following the signing of this order, the NQB decided to permit Sloan to list himself as a market maker in certain securities. (A154). However, it did not grant the general access to the pink sheets Sloan was seeking. (A225-7).

The NQB's explanation of this was that while the "NQB has no regulatory function and merely publishes quotations submitted by its subscribing broker-dealers" (A192), Sloan had been enjoined by an order of Judge Ward dated January 17, 1975 and therefore the issues presented by Sloan were moot. (A154)[8].

The affidavit of the NQB ignores several points and is contradicted by Sloan's affidavit. (A223). However, the gist of the argument of the NQB is that Sloan was attempting to force the NQB to violate its own "internal rules" (A154) or, in the alternative, to violate Judge Ward's order. The reason for this was that if the NQB were willing to accept listings without prices, the listings could not possibly violate Rule 15c2-1 because, according to an S.E.C. interpretation of that rule (A245-6), "name only" insertions are not considered to be quotations for the purposes of Rule 15c2-11.[9]

Thus, the argument that Sloan was attempting to force the NQB to help him violate Judge Ward's order was without basis. In fact, the NQB was trying to force Sloan to engage in a course of conduct which would have the effect

(f. 7 cont.)

the actions of the NQB goes far beyond the injury occasioned by being left out of the pink sheets. The National Stock Summary has a wider distribution than the pink sheets and purports to summarize all prices listed in the pink sheets.

8. Since the S.E.C. served the NQB with a copy of this order of injunction, (A153), one might infer that the NQB decided to breech its contract with Sloan in order to avoid contempt proceedings brought by the S.E.C. This would seem to represent another triumph for Big Brother.

9. This interpretation is consistant with §15(c)(2) of the Exchange Act, upon which Rule 15c2-11 is based, which gives the S.E.C. the power to define, by rule, what constitutes a "ficticious quotation." Clearly a "name only" insertion without a price could not possible constitute a "ficticious quotation."

of challenging the validity of Rule 15c2-11. In this respect, this case is somewhat similar to Carter v Carter Coal Co., supra where the sole stockholder of a corporation brought suit to enjoin his own corporation from complying with a federal regulation.

It should be said that the "internal rule" which the NQB is committed to defend has, in substantial part, led to not only this lawsuit but to the related lawsuit before Judge Ward. Since the S.E.C. has no objection to a broker listing a security in the pink sheets without prices, the only impediment to entry in the pink sheets is the "internal rule" of the NQB. The NQB has imposed this internal rule for reasons of economic self interest. Without the rule, brokers would have little incentive to publish quotes in the pink sheets and the NQB would have difficulty selling its National Stock Summary to banks and other financial institutions which use the National Stock Summary as the authoritative source for quotations information. (A134). Thus, a broker who wishes to make a market in securities in the pink sheets is caught in a squeeze between Rule 15c2-11 and the unpublished "internal rules" of the NQB. This fact constitutes one of the principal reasons for which Sloan felt compelled to institute this lawsuit.

It is submitted that the actions of the NQB as well as its "internal rules" constitute violations of anti-trust law. There can be no question that the NQB operates a monopoly. If there were in existence another equivalent publisher of quotations information, competitive forces such as the fact that Sloan would have a choice of where to take his quotations business would no doubt force the NQB to dissolve its "internal rules." In addition, if there were another publication in competition with the pink sheets, the NQB could not easily adopt its arrogant attitude of demanding that Sloan pay the NQB $1,755.87 while refusing to provide documentary evidence showing that Sloan, in fact, owed this sum of money. The fact that Sloan ultimately paid this bill does not render this issue moot because Sloan was exclusively a market maker in

securities and it was necessary for Sloan to pay this bill to survive in business. Goldlawr, Inc. v Shubert 268 F. Supp. 965 (D.C. Pa. 1967).

The NQB argues that there is no allegation of a conspiracy between two parties and that a conspiracy is necessary to make out a Sherman Act violation. However, the complaint alleges that the NQB "cooperated with the S.E.C. in depriving Sloan of his constitutional rights." (A63). Since the complaint alleges that the actions of the S.E.C. are beyond or outside of its statutory authority, it is submitted that there has been alleged a conspiracy between the NQB and the S.E.C. sufficient to make out a Sherman Act violation.

This argument also applies to another defendant, Disclosure, Inc. ("Disclosure"). In arguing the facts of this case with respect to Disclosure, a special problem is presented because the district court dismissed the complaint sua sponte as to Disclosure without the submission of any motion papers. Although it must be clear that the action of the district court constituted an abuse of discretion, the facts of the case as to Disclosure need not be overlooked.

Disclosure has a contract with the Office of Records and Services of the S.E.C. (A115). This contract gives Disclosure the exclusive right to reproduce material filed with the S.E.C. for sale to the public (A53). A person who wishes to obtain copies of material filed with the S.E.C. has two options. Either he may order the material from Disclosure at the rate of $.15 per page or he may go to one of the "public reference rooms" of the S.E.C. and use photocopy machines, owned and serviced by Disclosure, in which case the rate is $.10 per page.

Although not necessarily relevant to this lawsuit, the fact is that in return for this lucrative contract, Disclosure has agreed to provide a number of free services to the S.E.C. In particular, it microfilms and photocopies

all documents filed with the S.E.C. and provides copies of these documents to all regional offices of the S.E.C. In other words, Disclosure provides various services to the S.E.C. for free in return for which it is permitted to charge excessive rates to the public for these identical services.

At oral argument, counsel for Disclosure characterized itself as a "tag along party."(A312). This is not the case. The activities of Disclosure constitute an intergal part of a reprehensible scheme to expand the power of the S.E.C. at the expense of individuals such as Sloan. The activities of Disclosure are emphasized in the 1974 annual report of the S.E.C. which explains how a variety of services are performed for the S.E.C. at no cost to the taxpayer. In Securities Act of 1933 Release No. 5571, p. 7 n. 6, dated February 21, 1975, in discussing the relation of Disclosure to the S.E.C. with regard to the amendments to the Freedom of Information Act, the S.E.C. stated:

> "One commentator questioned the propriety of the Commission's procedure in contracting with a third party to perform duplicating services for members of the public. Since the Freedom of Information Act, as amended, authorizes only such fees as will recover direct costs of providing such services, 5 U.S.C. §552(a)(4)(A), it was questioned whether fees established pursuant to a contract that will allow a profit to the contractor are permissible. The Commission does not believe that the Freedom of Information Act requires that the agency itself perform the duplicating services that the Act contemplates. Moreover, the Commission does not believe that the new amendments should be interpreted to abrogate existing contractual commitments. However, after the termination of the existing duplication contract the Commission will consider the feasibility and economic advantage, if any, of renting or purchasing duplicating machines to be offered for public coin operation at a price reflecting the Commission's actual cost."

It is thus apparent that the S.E.C. has an arrangement with Disclosure and is prepared to defend that arrangement. However, the S.E.C. cites no statutory authority which gives it the right to make a contract with Disclosure or with any other private party. A requirement that one pay the rate of $.15 per page in order to purchase a copy of a document filed with the S.E.C. constitutes legislation and it is well established that Congress cannot delegate its legislative authority. National Cable Television v United States, supra 415 U.S. at 342 citing Schechter Poultry Corp. v United States, supra.

The district court dismissed the claim against Disclosure as "frivolous" (A313). However, it is hard to see precisely what is frivolous about this claim. Perhaps the district court felt that the rate of $.15 per page involved such a small amount of money that it was not worth the time and attention of the district court. However, in view of the millions of pages of documents filed every year with the S.E.C. the rate of $.15 per page can be seen to involve a not inconsequential sum of money. For example, Sloan has filed his own Freedom of Information Act request with the S.E.C. and the S.E.C. has sent Sloan an estimate that the cost to Sloan for reproduction of the documents involved in that request would be "somewhat in excess of $2,100." It should be noted that Sloan has requested principally all files and records compiled by the S.E.C. relating to Sloan. From this estimate it appears that the S.E.C. has compiled 14,000 pages of documents related to Sloan.[10]

The inclusion of Disclosure as a party defendant is necessary for several reasons, one of them being that the broad thrust of this lawsuit involves the question of the constitutionality of the power of the S.E.C. to regulate and suspend trading in securities. The S.E.C. contends that in most cases it suspends trading in securities because of the failure of the issuer to file financial reports with the S.E.C. (A75). Indeed, it is alleged that on one day alone the S.E.C. suspended trading in 48 securities because of a supposed failure to file financial reports. (A50-51).

Presumably, the requirement that an issuer of securities file financial reports with the S.E.C. has some purpose and that purpose presumably is to permit members of the public to read these reports. However, in order for a member of the public to obtain a copy of any report filed with the S.E.C. it must purchase the same from Disclosure which has a monopoly on the reproduction and sale of these reports. It is submitted that this monopoly, albeit approved by the S.E.C., violates federal antitrust law. It is further submitted that

10. Sloan also requested other documents not related to Sloan but the S.E.C. has not yet agreed to release most of these documents. If all documents requested by Sloan were to be released, the S.E.C. has estimated that Sloan would be receiving a "room full of paper."

even assuming arguendo that Sloan's real suit is against the S.E.C., Disclosure will be adversely affected by a court ruling in favor of Sloan and therefore must be included as a necessary party. Provident Bank & Trust Co. v Patterson 390 U.S. 102 (1968).

The remaining private litigant in this case is the NCC. The complaint alleges that in 1972 and 1973 Sloan attempted to join the NCC but was thwarted in his efforts to do so. (A32). The district court stated that Sloan could not join the NCC because he was not a member of the NASD (A311). However, the NCC has disagreed and on this point the district court must be in error. Nevertheless, in the moving papers and in the pleadings, the NCC gave no reason for excluding Sloan from membership although it admitted that Sloan had attempted to become a member. The fact is that no non-member of the NASD has ever been allowed to join the NCC.

It may have been that the district court dismissed the claim against the NCC on the grounds that Sloan was free to join the NASD and therefore had basis to complain about being excluded from the NCC. However, the NASD is or was supposed to be a trade association and membership in such an association should not be made a requirement for doing business. The NASD has a variety of rules which would adversely affect Sloan if he were to join. These rules need not be analyzed in detail here. Sloan has voluntarily chosen to stay out of the underwriting aspect of the securities business and the principal incentive for joining the NASD has always been the fact that NASD membership has been required to participate in underwriting syndicates formed between NASD members. Sloan does not do a general securities business with the public so that mutual funds and other matters of NASD concern are of no interest to Sloan. The jurisdiction of the NASD with respect to the trading of mutual funds has been approved by Congress, see United States v NASD, supra , but Congress has never expressed the view all over-the-counter traders should be required to join the NASD.

From these arguments, it must be clear that all the defendants are liable to plaintiff under federal anti-trust law. The Exchange Act provides no immunity from federal anti-trust law. Silver v New York Stock Exchange 373 U.S. 341 (1963). Even if an implied immunity could be found, the burden would be on the defendants to show that the immunity was necessary to make the Exchange Act work. Id. It is obvious in the case at the bar that the rule or policy which excludes non-NASD members from joining the NASDAQ is not necessary to make the Exchange Act work. Furthermore, the S.E.C. has no power to review the rates charged by Bunker Ramo Corp. and the NASD. The S.E.C. has never conducted a hearing or expressed an interest in regulating rates fixed by the NASD and Bunker Ramo Corp. for entry into the NASDAQ system. Therefore, assuming arguendo that the S.E.C. does have the power to review these rates, it has not actively and aggressively exercized this power and therefore the rates are not being regulated in the manner which Congress intended.

A number of Supreme Court decisions support the view of plaintiff. See e.g. Federal Maritime Commission v Seatrain Lines, Inc. 411 U.S. 726 (1973); Otter Tail Power Co. v United States 410 U.S. 366 (1973), rehearing denied 411 U.S. 910 (1973); Hughes Tool Co. v Trans World Airlines, Inc. 409 U.S. 363 (1973). In Federal Maritime Commission v Seatrain Lines, Inc., supra it was held that "repeals of the anti-trust laws by implication from a regulatory statute are strongly disfavored, and will be found only in cases of plain repugnancy between the antitrust and regulatory provisions." See also United States v Borden Co. 308 U.S. 188 (1939); United States v Southern Pacific Co. 259 U.S. 214 (1922); California v Federal Power Commission 369 U.S. 482 (1962); United States v Philadelphia National Bank 374 U.S. 321 (1963); Carnation Co. v Pacific Westbound Conference 383 U.S. 213 (1966). Furthermore, a district court's jurisdiction in antitrust matters may be restricted only where Congress has substituted for competition a comprehensive regulatory scheme which require an initial

determination of antitrust questions. United States v Philadelphia National Bank, supra; United States v Radio Corp. of America, supra; California v Federal Power Commission, supra.

An administrative agency such as the S.E.C. has neither the authority, the competence nor the power to determine anti-trust questions or to provide relief to injured private parties. Hence, deference to the S.E.C. is beyond the requirements of the statute which created the agency. Allied Air Freight, Inc. v Pan American World Airways, Inc. 393 F. 2d 441 (2d Cir. 1968) cert. denied 393 U.S. 846 (1968); Trans World Airlines v Hughes 214 F. Supp. 106 aff'd. 332 F. 2d 602 (2d Cir. 1964) cert. dismissed 380 U.S. 248 (1965); Breen Air Freight Ltd. v Air Cargo Inc. 1971 CCH Trade Cases ¶73,775.

It is patently obvious that defendants Bunker Ramo Corp., NASD, NCC, NQB and Disclosure operate monopolies in restraint of trade. No immunity can be derived from the fact that these are, in a sense, government created monopolies. The Framers of the Constitution were concerned over abuses of the monopolies created by the King of England. Furthermore, per se anti-trust offenses cannot be justified. United States v Topco Associates 405 U.S. 596, 609-612 (1972); Northern Pacific Railway v United States 356 U.S. 1, 5 (1958); Fashion Organizers Guild v Federal Trade Commission 312 U.S. 457 (1941).

In the court below, the NASD attempted to distinguish all of the cases just cited from the action at the bar. However, no distinguishing features can be found. Furthermore, the recent Supreme Court decision of Gordon v New York Stock Exchange, supra is of no help to the defendants. Two even more recent decisions in this circuit, Rich v New York Stock Exchange ______F. 2d.______ (decided July 8, 1975) and Jacobi v Bache & Co. ______F. 2d. ___(decided August 8, 1975) support the view of plaintiff. See also Thill Securities Corporation v New York Stock Exchange 433 F 2d.264 (7th Cir. 1970) cert. denied 401 U.S. 994 (1971). Therefore, the decision of the district court must be reversed.

POINT VI

THE DISTRICT COURT ERRED IN FAILING TO ENTER A DEFAULT JUDGMENT AGAINST THE UNITED STATES OF AMERICA.

The original complaint named the S.E.C. as the sole defendant. The S.E.C. interposed an answer which asserted as an affirmative defense the claim that the S.E.C. cannot be sued in its own name (A14). Sloan then filed an amended complaint which named as a defendant the "United States of America as the Securities & Exchange Commission."

There is nothing wrong with form of pleading. The United States district courts have frequently entertained suits brought against the "United States of America as the Interstate Commerce Commission." Such suits were required to be heard by a three judge district court under 28 U.S.C. 2325 until that act was repealed on January 2, 1975.

The case of Redmond v United States by and through the Securities Exchange Commission 518 F. 2d 811 (7th Cir. 1975) involves an instance where a form was utilized similar to that used by plaintiff here. In that case, the office of the U.S. Attorney defended and the S.E.C. did not appear. No claim was made that the S.E.C. could not be sued. Furthermore, no claim can be made by the United States of absolute immunity from suit. See Larson v Domestic & Foreign Corp. 337 U.S. 682 (1949).

The question of when to sue the United States and when to sue the government officials personally is a difficult one which need not be briefed here because, as will be seen, the United States of America is in default. However, it should be noted that there have been a number of cases where the United States has been held liable. Furthermore, since Sloan is suing for $29,600,000 it is presumably beyond the ability of the government officials to satisfy any judgment unless Robert Vesco paid more than they care to admit. In such a case the United States should be required to satisfy any judgment. cf. Youngstown Sheet & Tube v Sawyer, supra.

According to the proof of service and Marshal's return, the United States Attorney was served on November 8, 1974 (A67). On January 1, 1975, assistant U.S. Attorney, Naomi Reice Buchwald, wrote a letter to Judge Griesa a copy of which was sent to all parties. This letter stated that the Office of General Counsel of the S.E.C. would be appearing in behalf of defendant "United States of America as the Securities & Exchange Commission" unless the district court requested a separate appearance from the office of the U.S. Attorney. Apparently, Judge Griesa made no such request.

However, when the S.E.C. moved to dismiss it became evident that the S.E.C. was appearing for itself alone. Since statements made by the S.E.C directly contradicted the statements made by Naomi Reice Buchwald, Sloan felt compelled to move for a default judgment in order to preserve his rights. No opposition was filed to this motion but, at oral argument, counsel for the S.E.C. stood up in court and asserted that the United States had not been served. (A296). Judge Griesa apparently accepted this representation (A300) and dismissed the complaint. On February 25, 1975, before judgment was entered, Sloan asked the Marshal to make a second service on the U.S. Attorney (see A4). Although the Marshal protested that the U.S. Attorney had already been served, a second service was in fact made. At present, it is not known whether the office of the U.S. Attorney plans to appear in this appeal.

The apparent dispute arises from the fact that of the three copies of the amended summons and complaint supplied to the U.S. Marshal for service upon the United States, one seems to have been served upon Henry Wong. (A67).

Henry Wong is presumably the same Henry Wong that works as a litigation clerk for the S.E.C. How the marshal's office came to decide to serve Henry Wong and how Henry Wong came to accept service on behalf of "United States of America as the Securities & Exchange Commission" is not known or knowable to plaintiff. However, it is clear that the remaining two copies of the summons and complaint were properly served upon the office of the U.S. Attorney. It is also clear that any defect in the service is no fault of Sloan's since Sloan requested that three copies of the amended summons and complaint be served on the office of the U.S. Attorney (A67). At best, the U.S. Attorney is claiming that it received only two copies of the amended summons and complaint rather than the required three. However, this claim is a matter of trifling. It is apparent from the letter of January 6, 1975 that the New York office of the U.S. Attorney had in its possession a copy of the amended complaint. All of the parties to this case adopted the practice of serving all motion papers and pleadings on the office of the U.S. Attorney. In fact, a subsequent letter by Naomi Reice Buchwald to the court expressed a view as to the merits of this lawsuit and cited one case. Clearly, the office of the U.S. Attorney suffered no prejudice by any supposed error on the part of the Marshal's office. On the other hand, the plaintiff did suffer prejudice. Therefore, a default judgment should be entered in behalf of plaintiff against the United States of America.

The U.S. Attorney apparently believes that Rule 55(e) F.R. Civ. P. prohibits in all cases the entry of a default judgment against the United States. This is not the case. The substance of Rule 55(e) is that before a default judgment is entered, the court will conduct an inquest to assess the damages. This requirement is reasonable and protects the United States from undue prejudice. Needless to say, plaintiff has never expected to be awarded a default judgment in the amount of $29,600,000 without making a showing that he has sustained damages. In the case at the bar, however, damages can easily be proven because the injury occasioned by the activities alleged

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in the complaint cannot be doubted.

It should also be said that the belief by the U.S. Attorney that a default judgment can never be entered against the United States of America no doubt contributed to his decision not to appear and answer in this suit. If a default judgment is not entered in this case, the office of the U.S. Attorney will continue to harbor this illusion and the interests of justice will be impaired. Cases are hard to find on this point but Griffith v Nixon 518 F. 2d 1195 (2d Cir. 1975) is of some interest. Although that case establishes that the way to serve a former President of the United States is not to serve the office of the U.S. Attorney in Vermont, it leaves no doubt that federal officers are as much subject to service of process as anybody else.

POINT VII

THE DISTRICT COURT ERRED IN FAILING TO DISQUALIFY DENNIS C. HENSLEY, LLOYD J. DERRICKSON, ROBERT WOLDOW, THOMAS L. TAYLOR,III AND GEORGE W. BRANDT, JR. AND THE LAW FIRM OF ROGERS & WELLS FROM APPEARING AS COUNSEL FOR DEFENDANTS.

In the court below, Sloan presented what seems to be an iron clad argument for disqualifying all of the attorneys who filed motions to dismiss in this case. The facts on which this argument was based are best presented on pages A188-A195 and A203-A204 of the appendix and need not be repeated here. However, one of the more notable points is that Dennis C. Hensley, Lloyd J. Derrickson, Robert Woldow and Thomas L. Taylor, III are not members of the bar of the Southern District of New York and did not inform the court of this fact nor did they move for leave to appear as counsel of record. It may also be stated that had they made such a motion, it would in all likelyhood have been denied. The New York Regional office of the S.E.C. has an army of attorneys who represent the S.E.C. in the Southern District of New York every day. No reason has been given as to why all of the parties should suffer from inconvenience and delay in order to accommodate the S.E.C. in its desire to

have Thomas L. Taylor, III of the Washington, D.C. office of the S.E.C appear in this case. It must also be said that by permitting the S.E.C. to appear through its Washington, D.C. office, the district court conferred upon the S.E.C. a strategic advantage in its litigation against Sloan. The action at the bar was commenced on June 27, 1974. A number of delays occurred which were not necessarily the fault of any party but which probably would not have taken place had the S.E.C. appeared through its New York Regional office. Then, on December 30, 1974, the S.E.C. commenced its lawsuit against Sloan and representatives of the New York Regional office of the S.E.C. stated that it was ready to go to trial in that case the next day. However, in the instant case, on January 10, 1975, Thomas L. Taylor, III requested of Judge Griesa an additional month to file motion papers. Although Judge Griesa only alotted three weeks for that purpose the fact remains that the Washington, D.C. office of the S.E.C. was seeking adjournments and delays in the case before Judge Griesa that Sloan brought against the S.E.C. while at the same time the New York Regional Office of the S.E.C. was asking that the matter be expedited and heard immediately in the action before Judge Ward that the S.E.C. had brought against Sloan. Then, after the S.E.C. had succeeded in its efforts to delay the action before Judge Griesa while expediting the action before Judge Ward, it had the gall to argue that the action before Judge Griesa should be dismissed because the issues raised by Sloan were already being litigated in the action before Judge Ward.

In any event, the rules for the admission of attorneys to the Southern District of New York were not made to be broken. Since Thomas L. Taylor, III and the other attorneys previously mentioned have failed to comply with these rules they should not be permitted to appear in this case. It is ironic that the S.E.C., which is constantly making accusations that its rules have been violated, would commit a flagrant rule violation in the case at the bar.

Dennis C. Hensley, Lloyd J. Derrickson, and Robert Woldow all are or were house counsel for the NASD and/or the NCC. They also purported to represent Bunker Ramo Corp. Although it is not apparent from the record, it seems that Dennis C. Hensley, who was the original attorney who appeared in this case, is no longer employed by the NASD and has dropped out of the case for that reason. This,of course, is objectionable. As of this writing, the plaintiff has no concrete notion of what attorneys will be appearing in this case in the Court of Appeals. The plaintiff has a fundamental right to know who his advesaries are. It should be said that although the name of Breed, Abbott & Morgan appears on many of the papers submitted in this case, that law firm has appeared in name only and has requested that under normal circumstances no papers are to be served upon it.

The remaining attorney, George W. Brandt, Jr., is disqualified from appearing in this case as counsel for the NQB because previously he was employed by the S.E.C. and was, in fact, the attorney assigned to prosecute the S.E.C.'s first action against Sloan. The appearance by George W. Brandt, Jr. in this case was a clear violation of Canon 9, Ethical Consideration 9-3 of the Code of Professional Conduct of the American Bar Association. It is settled law that under these circumstances George W. Brandt, Jr. cannot appear in this case. See <u>In Control Data Corporation</u> v <u>International Business Machines Corp.</u> 318 F. Supp. 145 (D. Minn. 1970); <u>Allied Realty of St. Paul Inc.</u> v <u>Exchange National Bank</u> 408 F. 2d 1099 (8th Cir.) <u>cert. denied</u> 396 U.S. 823 (1969); <u>Hilo Metals Company</u> v <u>Learner Company</u> 258 F. Supp. 23 (D. Hawaii 1968). Since George W. Brandt, Jr. is employed by the firm of Rogers & Wells, that lawfirm should be disqualified from appearing in this case. <u>Handleman</u> v <u>Weiss</u> 368 F. Supp 258 (S.D.N.Y. 1973). See also <u>Cermaco Inc.</u> v <u>Lee Pharmaceuticals</u> 510 F. 2d 268 (2d. Cir. 1975). It should also be said that it is apparent from certain facts brought out in Sloan's affidavit (A195) that George W. Brandt, Jr. still bears personal animosity

against Sloan dating back to events which occurred during his employment with the S.E.C. and this personal animosity has already interfered with progress in this case.[11]

POINT VIII

THE DISTRICT COURT ERRED IN FAILING TO CONDUCT A HEARING AND IN FAILING TO ENTER A PRELIMINARY INJUNCTION AGAINST THE NQB.

On January 10, 1975 the district court signed an order directing the NQB to show cause by January 31, 1975 why it should not be preliminarily enjoined. (A130). The district court also stated orally that the matter would be set down for a hearing at 4:30 P.M. on February 14, 1975. Apparently the word "hearing" was used as a term of art because there was no actual hearing on that date. Instead there was what might be called an abbreviated oral argument.

Judge Griesa initially demonstrated a prejudicial attitude towards this matter by setting it down for a hearing at a date more than a month away. Under the General Rules for the Southern District of New York motions are to be made on ten days notice and the opposing party has five days to submit responsive papers. Usually, when an order to show cause is signed the matter is accelerated and set down for a hearing in two or three days. This occurs because the bringing of an order to show cause requires a showing that irreparable harm will occur if temporary relief is not granted. Sampson v Murray 415 U.S. 61, 88 (1974). Usually the bringing of an order to show cause indicates that some sort of an emergency has arisen. In the case at the bar such an emergency had indeed occurred because Sloan had just learned that he had been expelled summarily from the pink sheets. Nevertheless, Judge Griesa refused to grant a temporary restraining order which would have preserved

11. In a sense, all of this may be moot. Shortly after judgment was entered in this case it was said that George W. Brandt, Jr. was in the process of leaving the legal profession in order to become an Episcopalian priest. Whether this has actually occurred is not known. In any event, based upon the facts that were before the court when the case was decided there can be no question that George A. Brandt, Jr. should have been disqualified.

the status quo (A131) and made the motion returrable in 35 days; giving the NQB 21 days to respond.[12]

The NQB opposed the motion for a preliminary injunction on a number of grounds including the grounds that plaintiff had not demonstrated a high likelyhood of success on the merits and had not shown that irreparable harm would otherwise occur. However, this argument was based upon the affidavit of David Burnett which claimed that Sloan was then being granted access to the pink sheets. (A149). This affidavit was directly contradicted by Sloan's affidavit which claimed differently. (A223).[13] Under these circumstances, an evidentiary hearing was required before a decision could be made. S.E.C. v Spectrum Ltd. 489 F. 2d. 535 (2d. Cir. 1973).

The NQB also argued that Sloan should be required to post a bond to cover "costs and damages in the event it is wrongfully enjoined." However, as to the size of the bond, the NQB argued that the injunction sought was one which would "adversely affect a public interest for whose impairment even temporarily and injunction bond cannot compensate." (Citing Yakus v United States, supra 321 U.S. at 440-441).

It is submitted that all of these arguments were specious. Sloan was not required to post a bond because no harm could possibly result to the NQB from the granting of temporary injunctive relief. As for the public interest, the S.E.C., the self proclaimed guardian of the public interest, was on the scene and expressed no opposition to the motion for a preliminary injunction.

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12. It should be said that on January 10, 1975 George W. Brandt, Jr., counsel for the NQB, stated that he was going to be in Indiana for perhaps two weeks and therefore needed even more time to respond. However, Judge Griesa reminded Mr. Brandt that he worked for a large law firm and that there were other people in his office who were capable of preparing a response.

13. There had, in fact, been a change in circumstances between the time of the original order to show cause and the Burnett affidavit three weeks later. On January 10, 1975, Sloan was being denied all access to the pink sheets. However, after the order to show cause was signed the NQB decided to grant Sloan limited access to the pink sheets.

The NQB itself stated that it had "no regulatory function and merely publishes quotations submitted by its subscribing broker-dealers." (A152). It also stated that Sloan had paid for subscriptions through July 1, 1975. (A153). Thus, it was self evident that any refusal by the NQB to publish quotations would have the effect of breaching it's contract with Sloan. If that were not enough, Sloan demonstrated that a refusal by the NQB to publish quotations violated the anti-fraud provisions of the federal securities laws as well as the federal antitrust laws. Therefore, a preliminary injunction should have been granted and no bond should have been required. It should also be said that the NQB seemed to be arguing that a bond was required to pay "costs" including presumably legal fees in the event that it prevailed on the merits. However, under the "American rule" no legal fees are recoverable. Aleyska Pipeline Service v Wilderness Society ___ U.S. ___, 44 L. Ed. 2d 141 (1975).

In all probability, the real reason the NQB even bothered to oppose the motion for a preliminary injunction was to make a favorable impression on the S.E.C. At the time this motion was before the court, Congress was in the midst of considering legislation which would make the NQB subject to regulation by the S.E.C In fact, the NQB seemed to feel that certain changes had been made in what was to become the Securities Acts Amendments of 1975 in order to prevent a reoccurance of the events which led to this lawsuit and the related lawsuit which was pending before Judge Ward under docket no. 75 Civil 5729. For this reason, the NQB was anxious to present an image of utmost desire to cooperate with the S.E.C. At the same time, the NQB disliked Rule 15c2-11 as much if not more than Sloan, with good reason since this rule was costing the NQB an estimated $100,000 per month (A232-233). However, the NQB also estimated that if the S.E.C. were ever able to put the NQB in the position of forcing its subscribers to comply fully with Rule 15c2-11, it would cost the NQB $250,000 per year in computer time alone and, in addition its subscription revenues would be reduced. For this reason, the NQB was

actually encouraging Sloan and offering him behind the scenes support while maintaining a front of complete opposition to the relief Sloan was seeking.

In addition, the moving papers indicate that the NQB was at one point at odds with its own counsel. For example, at the time of the moving affidavit the NQB wanted to accept listings from Sloan, but its counsel, George W. Brandt, Jr., advised it not to do so. (A226). This circumstance led Sloan to conclude that counsel for the NQB was not representing best interests of its client and instead was representing the vested interest of all law firms who specialize in securities law to protect the S.E.C. and the fabric of so-called federal securities law from attack. (A193). This circumstance, in part, led Sloan to move to disqualify Brandt from acting as counsel. In support of this motion Sloan also pointed out that Brandt might be acting out of a desire to protect himself from criminal prosecution arising out of illegal acts committed by Brandt while employed by the S.E.C. (A193).

For these reasons, and particularly since no harm would result to the NQB from the granting of the relief requested, the decision of the district court in denying the preliminary injunction should be reversed. It should also be said that such a reversal would be of great immediate benefit to Sloan since, in June, 1975, the NQB once again expelled Sloan from the pink sheets and sent Sloan a check for the unexpended portion of his subscription fee. Traditionally, over-the-counter traders make most of their profits for the year during the last two weeks of December. Thus, if by chance this appeal is decided favorably to Sloan prior to the end of December, 1975, Sloan will be able to enjoy the economic benefit of being back in the pink sheets during the last two weeks of this year if the NQB is preliminarily enjoined.

POINT IX

THE DISTRICT COURT ERRED IN FAILING TO CONVENE A THREE JUDGE COURT PURSUANT TO 28 U.S.C. 2282 AND 28 U.S.C. 2284.

The original motion in this case was supposed to be a motion to convene a three-judge court. The notice given by Judge Griesa daily in the New York Law Journal states that no motions may be made unless there first has been a pre-motion conference. Although this procedure is irregular, Judge Griesa appears to be happy with it. However, there were several delays due to the unavailability of Judge Griesa which explains in part why it took from June 27, 1974, when this action was commenced, until February 14, 1975, when the first formal motion was decided.

In the middle of December, 1974 Sloan requested the scheduling of a pre-motion conference and was told that the earliest date on which Judge Griesa would be available was January 10, 1975. All parties were notified of this date. Apparently, on January 9, 1975, Judge Griesa decided to reschedule this conference for January 24, 1975. However, several parties who claimed not to have been notified of the rescheduling showed up in Judge Griesa's courtroom while a hearing was in progress. Sloan, who happened to be in the courthouse anyway because he was presenting his order to show cause, was summoned to Judge Griesa's courtroom. At this point the hearing which had been in progress was adjourned and the pre-motion conference was held.

Although the purpose for which the pre-motion conference was scheduled was to consider the question of convening a three judge court, Judge Griesa initially asked the defendants what motions they intended to make. The only response came from counsel for the S.E.C. who stated that there was an intent to make a "Rule 12 motion." After a brief unrecorded colloquy, Judge Griesa announced that all motions to dismiss were to be in by January 31, 1975 and that there would be no discovery until these motions had been decided. Judge Griesa then signed the order to show cause and the pre-motion conference was concluded.

It is submitted that this conduct was prejudicial. Judge Griesa

practically forced all of the defendants to move to dismiss apparently before some of them intended to do so. In the light of subsequent events it seems that Judge Griesa had already decided to dismiss the complaint and was merely waiting to establish a record on which to base his decision. It is submitted that in this manner Judge Griesa abused his judicial authority. It is quite possible that certain of the defendants would have preferred to go to trial as they did in Shumate & Co., Inc., supra. Even if Judge Griesa had made up his mind as to what his decision would be he should not have revealed his thoughts in this manner. In any event, Judge Griesa also stated that he would consider the motion to convene a three judge court on February 14, 1975.

A three judge court should have been convened. The question of the constitutionality of the Exchange Act has never been considered by the United States Supreme Court. In this regard the Exchange Act has led something of a charmed life. The Exchange Act came into being on June 6, 1934. The Railroad Retirement Act of June 27, 1934 was struck down by the Supreme Court in Railroad Retirement Board v Alton R.R., supra. The National Industrial Recovery Act of June 16, 1933 was struck down by a unaminous Supreme Court in Schechter Poultry Corp. v United States, supra. The Bituminous Coal Conservation Act of 1935 was struck down by the Supreme Court in Carter v Carter Coal Co., supra. Section 9(c) of the National Industrial Recovery Act of 1933 and certain Executive Orders made thereunder was struck down by the Supreme Court in Panama Refining Co. v Ryan 293 U.S. 388 (1935). These decisions are still good law. In National Cable Television v United States, supra 415 U.S. 345, 354 n. 1 (1974), Mr. Justice Marshall grudgingly noted in dissent that the decision in Panama Refining Co. would still be followed today. Schechter Poultry Corp., as noted previously, was followed in that decision for the first time since 1936. The arguments advanced by Sloan are only so frivolous as those Supreme Court decisions just cited. Indeed, it appears that the S.E.C. continues to label

all of the arguments advanced by Sloan as "frivolous" without citing appropriate cases because it is afraid to cite certain ill advised decisions which gave the S.E.C. some of the awesome power it has. See e.g. S.E.C. v Robert Collier & Co. 76 F. 2d 939 (2d Cir. 1935) reversing 10 F. Supp. 95 (S.D.N.Y. 1935).

Although some of the language of the Exchange Act was and is identical to the language of the statute found to be unconstitutional in Railroad Retirement Board v Alton R.R. (compare 295 U.S. at 362 n. 8 with the current Section 33 of the Exchange Act), the constitutionality of the Exchange Act was never considered by the Supreme Court during this period. In fact, the only time the constitutionality of either the Securities Act of 1933 or the Exchange Act has ever been considered by the Supreme Court was in Jones v S.E.C. 298 U.S. 1 (1936). Although that decision dutifully avoided the constitutional question by deciding against the S.E.C. on non-constitutional grounds, it left little doubt that the Supreme Court was prepared to declare the Securities Act unconstitutional were the right case to arise.

Unfortunately, the right case never arose. There seems to be a common presumption that decisions of this era are not to be taken seriously. However, Jones v S.E.C. dictates the procedures which are followed to this day with respect to the withdrawal of Securities Act registration statements. Also the decisions on which it was based are cited frequently. See, e.g., Garfield v Goldsby 211 U.S. 249, 262 (1908) where the Supreme Court, through Mr. Justice Day, stated:

> "There is no place in our constitutional system for the exercise of arbitrary power."

That quotation and the Supreme Court decision where it can be found are both authority for the proposition that the power of the S.E.C. summarily to suspend trading in a security is unconstitutional. The "roving commission to see a wrong and correct it" which the Supreme Court found to be unconstitutional in Panama Refining Co. v Ryan is also characteristic of the power of

the S.E.C. This is also unconstitutional under Standard Airlines v CAB 177 F. 2d 18 (2d Cir. 1949). Furthermore, the complaint alleges that the S.E.C. violated Sloan's constitutional rights by refusing to permit him to withdraw as a broker dealer (A61, ¶284) and Jones v S.E.C. is a case directly on point which establishes the correctness of Sloan's claim.

Other valid constitutional questions are properly raised in the complaint and Sloan should be permitted to litigate them. For example, with respect to certain of Sloan's allegations, a recent article in the New York Times is enlightening. This article, dated October 5, 1975 concerned an interview with "S.E.C.'s Tough Guy" enforcement chief Stanley Sporkin. The article states:

> In his recent book, "Lawyers" Ethics in an Adversary System," Monroe H. Freedman, dean of the Hofstra University Law School, said: "The S.E.C. has succeeded in intimidating the attorneys who appear before it, with the result that zealous advocacy has been sharply curtailed in securities matters."
>
> Mr. Freedman charged that the commission had asserted that lawyers owed a higher duty to it than to their own clients; rewarded cooperative lawyers by letting them appear before it "at a critical stage of the proceedings before their clients," an opportunity denied other lawyers; engendered a "climate of fear" among lawyers practicing before it by threatening that they would be prosecuted for failing to inform it of possibly incriminating information about their clients, and instituted its own disciplinary proceedings against lawyers who displeased its staff members.
>
> While Mr. Sporkin would obviously not be responsible for all these alleged evils, the allegations from a general backdrop in which he has to work.
>
> The enforcement chief is unequivocal in his denials. "Nobody has ever substantiated those charges," he said. "They are clearly a smoke-screen.

The question is: How can one prove these charges unless one is allowed to litigate them in court? Count II of the complaint, which avers that the S.E.C. has violated Sloan's constitutional rights by investigating his attorney and former accountant (A60) raises an issue virtually identical to that raised in the New York Times article just quoted and yet, at this point, plaintiff has been prohibited from litigating this issue.

An earlier part of that Times article states:

"Can this chunky, 43 year-old with clothes that look as if they were

going to burst at any moment be at the center of a drive to make America's biggest companies embarrass themselves by telling whom, how and when they bribed overseas?

Worse, is Mr. Sporkin - certified public accountant, lawyer and chief of the S.E.C.'s Enforcement Division, operating without legal authority, failing to observe due-process standards and browbeating corporations into admissions of guilt by not providing guidelines on what they do have to confess?

It is submitted that if the S.E.C. is failing to observe due process standards, which is one of the many allegations of the complaint, this is a matter to be decided by a three judge court. It is true that the Court of Appeals is, of course, a three judge court and under the Declaratory Judgment Act, 28 U.S.C. 2201, has the power to decide all constitutional questions involved in this appeal. However, these questions will not be briefed here mainly because the rules of this court concerning the length of briefs. Nevertheless, this court may take judicial notice of constitutional questions argued in briefs filed in Sloan v S.E.C. U.S.C.A. docket no. 74-2457; S.E.C. v Sloan & Co. U.S.C.A. docket no. 74-1436; S.E.C. v Sloan U.S.C.A. docket no. 75-7056 and S.E.C. v Canadian Javelin Ltd. U.S.C.A. docket no. 75-7046. It would not seem to accomplish any purpose to rebrief similar points here. However, it should be pointed out that one issue raised in the complaint, the constitutionality of the filing fees charged by the S.E.C., has already been decided favorably to plaintiff. In Federal Power Commission v New England Power Co., supra 415 U.S. at 350 n. 4 the Supreme Court declared the filing fees charged by the S.E.C. to be unconstitutional. However, the S.E.C. has continued to charge these fees and argues that Sloan has no standing to challenge the validity of these fees. The district court agreed (A306). However, the district court was in error. Form 211, which is based upon Rule 15c2-11, requires that a box be checked as to whether the issuer of a security is covered by Section 12(g). (A248). If the broker cannot check that box or one of the other boxes it becomes unlawful for that broker to trade in the security. Clearly, then, Sloan is adversely affected by Section 12(g) and the rules promulgated thereunder and possesses standing to challenge these rules. FCC v Sanders Bros. Radio Station 309 U.S. 470 (1940).

Also, reliance by the S.E.C. on Wright v S.E.C., supra and American Sumatra Tobacco Corp. v S.E.C. is inappropriate. These decisions have long since been superseded by numerous Supreme Court decisions and now have little more than historical value. For example, the S.E.C. bookkeeping, net capital and reporting requirements, which are specifically challenged in the complaint, are constitutionally invalid because they undermine the "required records" standards set forth in Shapiro v United States 335 U.S. 1 (1948); Marchetti v United States 390 U.S. 39 (1968) and Grosso v United States 390 U.S. 62 (1968). These cases require, first, that the records and reports be ones which would "customarily" be kept: second, they must have some specific "public aspect," and third, they must have arisen out of an "essentially non criminal and regulatory area or inquiry." Marchetti v United States 390 U.S. at 57. However, the Exchange Act is a criminal statute (see §32) and therefore the S.E.C. bookkeeping requirements are made in a criminal rather than a civil context. Also, under Albertson v SACB 382 U.S. 70 (1965) the requirement that a broker or dealer register with the S.E.C. is unconstitutional.

Similarly, the repeated unauthorized entries of Sloan's office which form, in part, the basis of Count II of the complaint (A60) are unconstitutional under See v City of Seattle 387 U.S. 541, 543 (1967) and Camara v Municipal Court 387 U.S. 523 (1967). In See the Supreme Court stated:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable office entries upon his private and commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

It has long been established that, under the constitution, an individual has the right to engage in private employment free from unreasonable govern- interference. Dent v West Virginia 129 U.S. 114 (1889); Allgeyer v Louisiana 165 U.S. 578, 589, 590 (1897); Schware v Board of Bar Examiners 353 U.S. 232 (1957); Peters v Hobbey 349 U.S. 331, 352 (1955); Truax v Raich 239 U.S. 33, 41, 60 (1915); Powell v Pennsylvania 127 U.S. 678, 684

(1888); Greene v McElroy 360 U.S. 474 (1959). There seems to be little doubt in the mind of any knowledgable person outside of the S.E.C. that the interference by the S.E.C. is often unreasonable.

Since the S.E.C. is unable to cite even a single case where these issues have been decided by the United States Supreme Court in a manner favorable to the S.E.C., a three judge constitutional court should be convened. Goosby v Osser 409 U.S. 512 (1973). This point was explained by Judge Lasker in Sugar v Curtis Circulating Co. 377 F. Supp. 1055, 1061 (1974).

In the court below as well as in other briefs filed in this court, the S.E.C. has attempted to avoid briefing the constitutional questions involved by labeling them "frivolous." However, the question of whether a constitutional argument is "frivolous" is not for a single district judge to decide. Instead, whenever an attempt is made to enjoin the enforcement of a federal statute a three judge court must be convened. If the matter is indeed frivolous the three judges can so decide with dispatch and remand back to the single district court judge. Therefore, Judge Griesa was in error in deciding this case without calling two other judges to his aid.

Any other result would be illogical and would lead to a chaotic situation. If a district judge were to deny the motion to convene a three judge court and yet fail to dismiss the complaint, the correct remedy would be not an appeal to the Court of Appeals but rather a motion for leave to file a petition for a writ of mandamus in the Supreme Court of the United States. Ex parte Bransford 310 U.S. 354 (1940); Stratton v St. Louis Southwestern Ry. Co. 282 U.S. 10 (1930); Ex parte Metropolitan Water Co. 220 U.S. 539 (1911); Ex parte Williams 277 U.S. 267 (1928); see also Fiumara v Texaco Inc. 240 F. Supp. 325 (1965) and Miller v Smith 236 F. Supp. 927 (1964). For this reason, the failure to convene a three judge court could result in having an appeal filed in the Court of Appeals while a petition

for a writ of mandamus was pending in the Supreme Court of the United States. Thus the time of nine Supreme Court justices and three Court of Appeals judges would be spent because of the failure of the single district court judge to convene a three judge court. Therefore, Judge Griesa must be reversed and a three judge court must be convened.

CONCLUSION

For all of the reasons set forth above the judgment should be vacated and the judgment of the district court should be reversed.

DATED: November 9, 1975

Respectfully submitted,

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STATE OF NEW YORK)
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ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 13 day of November 1975 deponent served the within brief upon:

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WILLKIE, FARR & GALLAGHER
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SECURITIES & EXCHANGE COMMISSION
Breed, Abbott & Morgan
U S Atty

attorney(s) for appellees in this action at.
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in ~~this action, at~~

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 14
day of November, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976